[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED

1. Whether, on the specific facts of this case, the punitive damages award violated TXO's substantive due process rights.

2. Whether the procedures employed in this case with respect to the punitive damages award violated TXO's procedural due process rights.

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

A. Introduction

TXO's description of this case as one in which a party who suffered $19,000 in out-of-pocket losses was awarded $10 million in punitive damages ignores completely the record evidence and the West Virginia Supreme Court's analysis.

The reality of this case is that TXO embarked upon a three-month fraudulent scheme which included attempted subornation of perjury in an effort to misappropriate a stream of royalties worth between $5.0 million and $8.3 million that properly belonged to respondents. In the process, TXO attempted to circumvent West Virginia's system of market exchange and private property rights on which oil and natural gas development (indeed all commercial intercourse) depends. TXO's conduct was dangerous and, as the state supreme court found, reflected a "pattern and practice of fraud, trickery, and deceit" that threatened "millions of dollars" in harm. Pet. App. 40a.[1]

Fortunately, TXO's plan was foiled: respondents refused to capitulate to TXO's attempted extortion and defeated TXO's fraudulent scheme, at a cost of $19,000 in attorney's fees. Because the TXO scheme had an enormous expected gain and risked causing severe social harm, the West Virginia Supreme Court quite reasonably found that the jury's award of $10 million was "necessary," Pet. App. 40a, to provide adequate deterrence and retribution. The fact that this sum happened to be approximately 526 times the cost of defeating TXO's scheme is an arithmetic curiosity with absolutely no constitutional relevance.

TXO's *amici*, in a helpful, if somewhat morbid, illustration of the appropriateness of punitive damages here, explain that punitives far in excess of a compensatory award are warranted "where a defendant has engaged in heinous conduct with huge potential for harm, but which resulted in little actual harm (*e.g.*, the defendant

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[1] Citations to the Appendix to the Petition for Certiorari will be styled "Pet. App. ___a." Citations to the Joint Appendix will be styled "J.A. ___." Citations to the Brief of the Petitioner will be styled "Pet. Br. ___." Citations to the Appendix to Petitioner's Brief will be styled "Pet. Br. App. ___." Citations to the record and transcript below will be styled "Rec." and "Tr."

throws harmful acid at a person's face, but misses, causing only minimal clothing damage)." Brief of the American Automobile Manufacturers Ass'n, *et al.*, at 23 ("Auto Br."). *Amici* ignore the supreme irony that TXO is *precisely* like the assailant foiled only because a quick-thinking victim dodges the airborne acid.

TXO tries desperately to persuade this Court that "[t]his is th[e] case" in which the line on punitive damages should be drawn. Pet. Br. 6. But this is not the case that TXO claims it to be. As the Brief of 27 States as *Amici Curiae* Supporting Respondents ("States' Br.") demonstrates, drawing the line here would be a throwback to *Lochner v. New York*, 198 U.S. 45 (1905), and would undermine a longstanding common-law doctrine necessary to serve fundamental state interests.[2]

B. TXO's Secretive Scheme of Intentional Fraud Calculated to Steal Between $5.0 Million and $8.3 Million in Respondents' Property Rights

TXO's four-paragraph recitation of the facts (Pet. Br. 1-3) is woefully incomplete.

This case involves "the oil and gas development rights to 1,002.74 acres in McDowell County," West Virginia, called the "Blevins Tract." Pet. App. 7a. In 1984 and 1985, TXO's geologists became excited at the prospect of drilling this promising

[2] This case is *not* a symptom of the alleged "explosion in the frequency and size of punitive damages awards" attributable to "changes in the law" permitting "product liability and mass tort" actions and other innovations. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1066 (1991) (O'Connor, J., dissenting). This case involves an intentional tort (slander of title) that has existed since 1591. Pet. App. 14a. "The current debate over punitive damages does not involve intentional torts." Landes & Posner, "New Light on Punitive Damages," *Regulation* 33 (Oct. 1986). Indeed, some of TXO's *amici* lament what they see as the increasing award of punitive damages in products liability cases and yearn wistfully for the common-law days when punitive damages were awarded chiefly in intentional tort cases, without recognizing that *this is an intentional tort that has been eligible for punitive damages for hundreds of years. See, e.g.*, Auto Br. at 10-13; Brief of Product Liability Advisory Council, Inc., as *Amicus Curiae* in Support of Petitioner at 8-9 ("Prod. Liab. Br.").

tract as part of TXO's extensive Appalachian drilling operations.[3] The Blevins Tract was bordered by lucrative wells, and on that basis TXO geologists recommended that TXO "drill the Blevins # 1 as a field development well" which would have "a high probability of success." DX-3, Rec. 1729; *see also* Tr. 110-11, 547-48. A memo from Mike Good, the head of the TXO office in Charleston, written to a superior in Dallas, reported that the Blevins Tract was a "solid prospect[] with multi-pay potential," and that "[m]arkets are available . . . in the $3.00/Mcf [one thousand cubic feet of gas] range." DX-4, Rec. 1730; Tr. 672-73.

The revenues that TXO expected from the Blevins Tract were enormous. TXO did not drill wells unless it expected that at least 350,000 to 400,000 Mcf could be produced from each well. Tr. 536; *see, e.g.*, DX-6, Rec. 1735. Good's memo to Dallas, written on April 29, 1985 — just days before TXO set into motion its scheme of fraud and deceit — noted that benchmark wells adjacent to the Blevins Tract had reserves of 500,000 Mcf and up. DX-4, Rec. 1730. Given the anticipated market price of $3.00 per Mcf, TXO expected a total revenue stream of $1.5 million from each well. Many wells could be placed on the 1000-acre Blevins Tract without reducing each well's production — easily 15 wells and

[3] This area of West Virginia had long been known for its natural gas reserves. The Blevins Tract was originally held (pursuant to a royal patent) by Robert Morris, signer of the Declaration of Independence and financier of the Revolutionary War. George Washington was among the first to recognize the value of the "burning springs" in this area of West Virginia. Tr. 426. Active interest in the mineral rights to this valuable land commenced in the 1850s. Tr. 426. A "rush to develop the area" began in 1966. Tr. 24.

Despite TXO's suggestion that it had only "a small operation" in West Virginia, Pet. Br. 1-2, as part of its extensive Appalachian Basin exploration and drilling program, TXO was in fact "particularly active" in West Virginia, and had twenty-five employees based in Charleston, West Virginia. Tr. 380, 382. During the four years relevant to the conduct at issue, TXO drilled or took over 98 wells in West Virginia. Tr. 158-59. In particular, during this time TXO was making extensive efforts in West Virginia to drill "developmental wells" on lands such as the Blevins Tract, to exploit "new reserves off of current producing wells." Tr. 628. TXO's efforts focused on McDowell County, Tr. 562-63, and more specifically on the Blevins Tract, whose 1,000-acre size and proximity to proven reserves made it an extremely attractive prospect. Tr. 547-48.

perhaps as many as 25.[4] Thus, the value of the total income stream that TXO would expect from the Blevins Tract was somewhere between $22.5 million (with 15 wells) and $37.5 million (with 25 wells).[5]

TXO could not drill the Blevins Tract, of course, until it acquired the right to do so. At that time, the rights to drill for oil and natural gas on the Blevins Tract were held by respondent Alliance Resources Corp., Tr. 566,[6] a small but experienced Texas-

[4] Expert testimony presented by Alliance established that "[f]ifteen [wells] could certainly be put on this property" and if "properly spaced . . . shouldn't impact on one another at all," Tr. 102 — and that as many as 25 wells might be placed on the Blevins Tract. Tr. 99. The calculations of TXO's own expert were consistent with this testimony, indicating that 22 wells could be placed on the tract. *See* Tr. 535-36 (estimating that approximately 45 acres of drainage were necessary for each well, yielding the potential for 22 wells on the 1000-acre tract). Good confirmed that TXO planned to drill multiple wells on the Blevins Tract. Tr. 673.

[5] *After* TXO's scheme was foiled, and TXO was facing a counterclaim for slander of title, TXO did its best to minimize the value of the Blevins Tract. As a litigation tactic, TXO hid evidence of the value of the asset that it had sought to appropriate. TXO refused to produce any gas from the well (so that its profitability could not be thoroughly appraised), and told Alliance that "the well . . . would not be put in production until the law suit was cleared up," Tr. 91, and as a result Alliance got "not a penny" from the well. Tr. 90. TXO sold all its *other* wells but kept control of the well on the Blevins Tract, Tr. 180, and just one month before trial — over the objections of one of the respondents — TXO pumped cement down the well, plugging it forever and making it impossible further to assess its potential. Tr. 106-07, 175-76.

Despite these efforts to hide the value of the Blevins Tract, the jury was apprised of an internal TXO letter written in July 1986 (nine months after the well was drilled) showing that TXO considered the Blevins Tract to be viable for multiple wells. *See* Tr. 544-46. Expert testimony established that even based on the well's allegedly disappointing results, and even at the lower market price that existed at the time of trial ($2.50 per Mcf), the well would have returned $911,750 in gross revenues — for a total of $13,676,250 in gross revenues for the Blevins Tract as a whole (assuming conservatively 15 wells), of which respondents would have received about $3 million. Tr. 100, 105, 116. In any event, as explained in Part I-A-3, *infra*, the relevant valuation of the Blevins Tract and respondents' royalty share is the value that TXO *expected* at the time it committed the tort at issue.

[6] Other interests in the oil and gas rights to the Blevins Tract were held by respondent Tug Fork Land Company, which owned the oil and gas rights, and respondents George King and Grover C. Goode, who had leased these

based oil and gas development firm staffed by Brian Robinson and one other employee. Tr. 59. Like TXO, Alliance in the mid-1980s was actively developing wells in West Virginia. Tr. 60-62. In late 1984, TXO approached Alliance seeking to purchase these rights. After Alliance initially declined, TXO upped the ante, making Alliance a "phenomenal" offer under pressure from TXO's geologists, who were eager to drill the field.[7]

On April 2, 1985, TXO and Alliance reached an agreement. Alliance assigned its rights on the Blevins Tract to TXO in exchange for an up-front payment of $20,000 plus the right to 22 percent of the gross revenues from all natural gas ever produced from the tract. Pet. App. 8a. Alliance did not guarantee good title to the land. Instead, Alliance agreed that, if TXO's counsel found any title problems with the Blevins Tract, TXO would have the absolute right to withdraw from the deal, and Alliance would be obliged to pay back the $20,000 up-front money. *See* Pet. App. 8a-9a n.1.

Not long after the ink on the deal was dry, TXO embarked on a clandestine plan to recapture the "phenomenal" 22 percent share of gross revenues that it had been forced to offer Alliance in order to obtain the rights to the Blevins Tract. Alliance's share, based on projections of the value of the tract, represented a stream of revenue

rights (under the name "Georgia Fuels") and thereafter assigned their lease to Alliance. *See* Pet. App. 7a. For simplicity, the term "Alliance" will be used in contexts involving the collective ownership interest of all respondents.

[7] Alliance, intending to drill the property itself, initially declined to assign its lease to TXO, instead proposing a joint venture in which TXO would have paid 75 percent of the drilling costs, reaping 80.25 percent of recovered gas and paying the remainder (19.75 percent of the gas) in lease royalties to Alliance. Pet. App. 8a; Tr. 64-67. TXO turned down Alliance's offer, indicating that it "considered [this 19.25 percent burden] to be too great." Tr. 68. *See also* Rec. 1713 (internal TXO document rejecting offer because "burdens determined to be too large for Joint Venture"). "Only a few months later, in February, 1985, however, TXO approached Mr. Robinson with" what Robinson quickly accepted as "a 'phenomenal' offer" to buy out Robinson's interest. Pet. App. 8a; Tr. 70-71. The TXO employee with whom Robinson negotiated explained to Robinson that the reason for TXO's sudden intense interest was "that there was a new senior vice president in charge of TXO [P]roduction in West Virginia." Tr. 68-69. In reality, as another TXO employee admitted at trial, the "change in [TXO's] position between the two points in time" occurred because "[t]he geologists were pushing for it a little bit harder." Tr. 569.

worth between $5.0 million and $8.3 million (22 percent of the total expected gross income stream, *see* pp. 3-4, *supra*.)

TXO set out to build a phony chain of title, using a fraudulent scheme that had a long and notorious history in West Virginia. TXO's chief title attorney on the Alliance case admitted in testimony at trial that he knew that the State's system for determining ownership of mineral rights had once been threatened by widespread land fraud. Land thieves, he noted, "would try to build a title for themselves," typically by getting someone "to give them a quit claim deed." Tr. 427. Indeed, land fraud involving quitclaim deeds had been a problem specifically in McDowell County. Tr. 436-37.

TXO resorted to this classic means of fraud based on a theory — concocted by TXO officials — that a predecessor in Alliance's title had inadvertently conveyed the right to drill for oil and gas in a 1958 deed which conveyed coal exploitation rights to coal operator Leo J. Signaigo, Jr. *See* Pet. App. 9a. TXO concealed this theory from Alliance for several months while it maneuvered to position itself as the titleholder under the Signaigo deed, and then surprised Alliance with its fait accompli in a letter dated July 12, 1985. Rec. 1616-17 (PX-4, letter from Larry L. Skeen).

Paragraph 1 of the 1958 deed did transfer to Signaigo "all the coal *and other minerals and mineral substances* in, on and underlying the" Blevins Tract. Pet. App. 10a (emphasis added). Paragraph 6, however, specifically reserved to the landowner (whose interest Alliance ultimately acquired) "the right to bore for and remove *all the oil and gas* underlying" the Blevins Tract. *Id.* (emphasis added). As both courts below found, this language in ¶ 6 was unambiguous in reserving to Alliance's predecessor the rights to the oil and gas underlying the Blevins Tract, and TXO's position was, as a legal matter, "ridiculous." Pet. App. 10a-11a & n.3; *see also* J.A. 12. Choosing simply to ignore ¶ 6, TXO focused exclusively on a separate and independent reservation clause in ¶ 2(a), which TXO underlined as the "relevant language" in a copy of the 1958 deed attached to the July 12 letter to Robinson. Pet. App. 46a. As one respondent testified at trial: TXO "refused at all times, even to look at the fact that there may be some paragraph in here besides paragraph 2. . . . [O]bviously they were just ignoring the rest of the deed. In other words, this one suited their purposes, let's don't go any further." Tr. 29-30.

TXO then set out to find support for its theory from Mr. Signaigo and others to whom Mr. Signaigo had sold his rights. It commenced this effort approximately a month after signing its deal with Alliance, and days after a key report confirming the value of the Blevins Tract (*see* DX-4, Rec. 1730, dated April 29, 1985). Detailed contemporaneous notes of the responsible TXO employee, Duncan Wood (PX-12; Tr. 1644), showed that TXO's effort came up empty. On May 6, 1985, Mr. Wood:

> (1) "Called . . . Mr. Signaigo [who] said he thought he had only purchased coal and that he had sold it to . . . Hawley Coal Mining Corp."
>
> (2) "Called . . . [head of] Hawley," and "to his knowledge they had only purchased the coal," and then "had sold what they owned to Virginia Crews Coal Company."
>
> (3) "Called [Virginia Crews' general manager] . . . who informed me that they (Virginia Crews) believed they had only purchased the coal under the acreage *as did all the other predecessors in title since Tug Fork*."

Rec. 1645 (emphasis added). Testifying at trial, Wood confirmed that "[e]veryone here told [Wood] that nobody in this chain of title had the gas." Tr. 596; *see also* Pet. App. 20a.[8]

Undaunted, TXO then proceeded to entice (or, less charitably, to bribe) Virginia Crews to act as if it *might* have an interest in the oil and gas, and to "sell" TXO a quitclaim deed. Tr. 427. Even though Virginia Crews had already told TXO that it owned no oil or gas rights, TXO attempted to persuade Virginia Crews to the contrary and to sell TXO a quitclaim deed. As Wood's notes reveal, TXO volunteered information about "a cloud on [TXO's] title" and said that "it appeared by the language of the conveyance that they [Virginia Crews] owned the oil & gas." Rec. 1645-46.

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[8] Specifically, Wood agreed that "Signaigo told [Wood] very plainly that he didn't have any gas underlying that property" and "told [Wood] he'd only purchased the coal," Tr. 592; that the Hawley official "told [Wood] to his knowledge they'd only purchased the coal under the 1,000 acre tract," Tr. 594; and that the head of Virginia Crews "informed [Wood] that they believed they had only purchased the coal under the acreage." Tr. 596.

Wood confirmed the accuracy of these notes at trial, explaining how he attempted to "talk Virginia Crews into believing they did have" the oil and gas. Tr. 597.

TXO then offered to buy a quitclaim deed *in TXO's name*. Virginia Crews expressed suspicion at TXO's overture and had its lawyers research the title for more than a month. Rec. 1648, 1651. It ultimately decided to accept $6,000 from TXO in exchange for the quitclaim deed, but it flatly refused to warrant title to the property, evidently believing after careful study that it had no colorable claim of title. Tr. 573-75; Rec. 1651-52.

After securing Virginia Crews' agreement to convey this quitclaim deed, TXO set out to suborn perjury from Signaigo, in an apparent effort to bolster the plausibility of its title theory. TXO drew up a pre-printed affidavit for Signaigo to sign which "*falsely* stated that Mr. Signaigo could not say whether the oil and gas rights were included in the 1958 deed," flatly contradicting his earlier statements to TXO. Pet. App. 9a (emphasis in original). The affidavit was presented by Wood, a notary public, whom, of course, Signaigo had earlier told that he did not believe he owned any oil or gas. Signaigo refused to swear to a lie and did not sign the affidavit. Rec. 1649, Tr. 605.

As the court below recognized, these actions reflected no mere "excess of zeal by poorly supervised, low level employees," Pet. App. 20a, but were instead part of a concerted corporate strategy approved at the highest echelons. A key internal TXO memorandum dated May 30, 1985, one day after a TXO geologist's glowing report on the Blevins Tract (DX-3, Rec. 1729), shows that TXO officials, including corporate counsel in Dallas, decided to assert a claim to the Blevins Tract based on the quitclaim deed in order to obtain "a chance of the court conferring TXO with 100% interest." PX-8, Rec. 1635. In the words of the West Virginia Supreme Court, this was nothing less than "an attempt to steal [respondents'] land." Pet. App. 20a. TXO's goal was to trigger judicial error based on the evidence TXO had itself manufactured. Indeed, the May 30 decision to go ahead with the fraudulent scheme was made only days before TXO attempted to obtain the false affidavit from Signaigo.

TXO actually received the quitclaim deed from Virginia Crews on July 1, 1985. Tr. 576. But it was careful to complete three steps before actually filing the deed. First, top TXO official Mike

Good completed a final Operations Package confirming the enormous revenue potential of the Blevins Tract. *See* DX-6, Rec. 1735. Second, the key TXO official in charge of the plan, including Dallas corporate counsel, held a conference call on July 10 to cover (as Wood's notes reveal) "all the pertinent facts." Rec. 1652. Finally, the TXO officials made sure that Good "was apprised of the situation" and "concurred with the actions being taken." *Id.* Then, on July 11, 1985, the quitclaim deed was filed.

Armed with the quitclaim deed, TXO sprang its trap on an unsuspecting Alliance.[9] The day the quitclaim deed was recorded, July 11, TXO employee Duncan Wood called Robinson, saying that he was "following orders on instructions from Dallas," Tr. 124, to put Robinson on notice of an alleged title defect on the Blevins Tract, and to inform him of the quitclaim deed. Tr. 80, 124. The following day, TXO's counsel wrote a threatening letter, *see* p. 6, *supra*, contending that TXO might well be "the owner of the oil and

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[9] Although TXO claims that "nothing about this case indicates that TXO's misconduct was easily concealed," Pet. Br. 31, TXO in fact concealed its scheme for more than three months, from April 2 to July 11, 1985. Prior to July 11, despite Robinson's frequent contact with Charleston TXO staff over TXO's seemingly endless delay in paying the $20,000 up-front money owed since April 2, TXO breathed not a word of the alleged title problem. Pet. App. 11a.

TXO paid Alliance using a "sight draft," which Robinson thought was a check but which was really a fancy "I.O.U." with a built-in stop payment. Tr. 73-74. Robinson took it to the bank, but it "wouldn't cash." Alliance's bank was forced to call TXO "to see if they're willing . . . to pay the sight draft." Tr. 74. They were not. For three full months Alliance and its bank "repeatedly" attempted to have the sight draft paid. Tr. 75. Robinson regularly called TXO employees in Charleston, asking: "[W]hat's wrong here? How come I'm not being paid?" Tr. 76. TXO provided the typical "list of excuses a mile long" used in similar schemes. Pet. App. 23a. Robinson was told "[n]ot to worry about it, that it was just some bureaucratic hangup in Dallas." "[T]hey apologized," and said that "it would all be taken care of and that they were on top of it," and that he should "[j]ust remain patient." Tr. 76.

The delay, however, was not a product of "normal corporate bureaucracy," as TXO represented. Tr. 78. Rather, an internal memo summarizing the key May 30 conference call during which TXO's scheme was discussed reveals a corporate decision to "pay the draft to Alliance," by then long overdue, only *after* all details of the scheme were worked out. Rec. 1635. The sight draft finally cleared around July 1, 1985. Tr. 78.

gas in place." Rec. 1617. TXO's attorney warned respondents that, unless they could "work out a mutually satisfactory settlement concerning this issue, I have been instructed to prepare and file a suit" to "determin[e] the ownership . . . [and thus] the distribution — of possible oil and gas revenues." Rec. 1617.

TXO called a meeting with Robinson and several TXO officials at which, Robinson testified, TXO's counsel "began immediately very aggressively explaining to me how under West Virginia law I did not have a valid lease," and "sticking [highlighted portions of the pertinent law] under my nose," saying: "Read this, read this, read this. You don't have a lease." Tr. 83; *see also* Pet. App. 12a. The point of the meeting was that TXO "wanted concessions" on the 22 percent royalty interest TXO owed Alliance, or else TXO was "going to file suit" and was "going to try to remove us entirely from this lease." Tr. 84. Because "all of us would be totally wiped out with regard to this lease," Robinson testified that he "felt like [he] was being ambushed," Tr. 86, but he stood firm despite TXO's extortion attempt.

Outraged by TXO's "blackmail," Tr. 39, one respondent threatened to sue for punitive damages unless TXO desisted. Rec. 1656. TXO was undeterred by the warning and continued its pattern of threats. Rec. 1640-41. Robinson refused to capitulate.

TXO's brief suggests that removing clouds on title is good business practice, *see* Pet. Br. 3, as the West Virginia Supreme Court readily agreed. *See* Pet. App. 12a. But standard business practice for quieting title does not involve attempting to steal from the lessor, or suborning perjury.[10]

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[10] The parties' own April 2 agreement, for example, expressly provided a fail-safe remedy for any title problem: TXO could have backed out of the agreement altogether, and Alliance would have returned all of TXO's up-front money. *See* p. 5, *supra*. At minimum, as TXO's expert witness admitted at trial, it is standard practice in the event of a title problem immediately to notify the leaseholder so that all the parties working together can solve whatever problems exist. Tr. 716-17. In this case, any bona fide title problem could easily have been solved by TXO's obtaining written disclaimers from Signaigo and his successors in interest, memorializing their earlier statements that they owned no oil or gas rights. Indeed, TXO's title attorneys had suggested this option at the time. Tr. 584-87. Finally, TXO's expert witnesses on title problems admitted that TXO could have obtained a quitclaim deed directly in the name of its lessor, thus bringing about unity of title and protecting the arrangement between TXO and Alliance, rather than itself securing a quitclaim that it could use to coerce alterations in its deal with Alliance. Tr. 520, 701.

In sum, the record below strongly supports the West Virginia Supreme Court's finding that TXO made calculated, clandestine attempts, through "unsavory and malicious practices," Pet. App. 20a, to build a phony chain of title that slandered Alliance's title, in an attempt to wipe out, or at least reduce, the royalties that TXO was obligated to pay. Pet. App. 7a, 20a.

C. The Trial and Appellate Court Proceedings That Produced, and Confirmed the Necessity of, a $10 Million Punitive Damages Award

TXO lost its declaratory judgment action. J.A. 12. The court found, as Signaigo and his successors in title had insisted, that the rights they bought did not include oil and gas, given the clear reservation of these rights in ¶ 6 of the 1958 deed. Consequently, TXO's quitclaim deed from Virginia Crews was a nullity, and Alliance retained its 22 percent interest in the Blevins Tract.

On trial of Alliance's counterclaim for slander of title and punitive damages, TXO chose what can only be described as a "Big Lie" strategy — completely denying any wrongdoing and claiming a "good faith" mistake in filing the quitclaim deed. Pet. App. 26a. TXO adheres to that strategy before this Court, claiming simply that "TXO's attorneys opined that title was not clear," and "[b]ased on its attorneys' advice, therefore, TXO obtained and recorded a quitclaim deed," after which "[t]he parties were unable to reach any agreement" and a lawsuit followed. Pet. Br. 2-3.

Huge gaps in this "good faith" story were exposed at trial. The head of TXO's Charleston office, Mike Good, attempted to persuade the jury that he had been forthright with Alliance, keeping it informed at all times. Tr. 634-35. Yet he was forced to admit that the July 11 call, made *after* the recording of the quitclaim deed, was the first notice to Alliance that there was any question with respect to title. Tr. 654; *see also* Tr. 84-85, 145. After TXO's counsel confirmed that TXO had deliberately and carefully concealed the supposed problem from Alliance until July 11, Tr. 457, Good was further forced to admit that his threatening letter of August 15 had been false in claiming that "[a]s soon as we were advised of the problem by our attorney we advised you by letter." PX-11, at Rec. 1642; Tr. 654.

Even more damaging to TXO's claim of "good faith" was Good's admission that *he* at all times knew that Alliance held the rights to the gas. Tr. 638, 657. Despite a May 30 internal TXO memo noting an explicit corporate objective of obtaining "a chance of the court conferring TXO with 100% interest" on which "Good concurs" (PX-8, Rec. 1635), Good told the jury that he had fully intended to honor the 22 percent royalty commitment even if a court had ruled that TXO owned all rights to the gas! Tr. 667. No evidence supported this assertion.

The testimony of Duncan Wood, the TXO employee personally handling many aspects of the case, further demonstrated TXO's bad faith. Wood was the notary public sent to Signaigo's home to swear him to a lie. Prior to Wood's testimony at trial, TXO evidently was unaware that *respondents had a copy*, saved by Signaigo, of this false affidavit. At trial Wood pretended that the purpose of the trip was to get Signaigo to confirm his earlier oral statement to Wood "that he had *not* bought the oil and gas." Tr. 601 (emphasis added). The actual affidavit was then produced for Wood, judge, and jury to see. Wood was forced to read the affidavit to the jury, which would have had Signaigo saying he "did not know" whether he had bought the oil and gas, and guaranteeing that if called at trial he "could not agree" to support Alliance's interpretation of the 1958 deed. Tr. 604. Wood was further forced to admit that he had asked Signaigo to swear to the affidavit, *knowing* that the affidavit did not state what Signaigo had earlier told him. Tr. 605-07.

Also rebutting the theory that TXO had simply made a mistake was the evidence at trial establishing that actions taken toward Alliance were typical of TXO's "pattern and practice . . . to defraud and coerce those in positions of unequal bargaining power *vis a vis* TXO's superior legal firepower." Pet. App. 20a. Indeed, so strong was this evidence that the court below recognized that, if left unchecked, TXO's chronic wrongdoing would inflict "millions of dollars in damage to other victims." Pet. App. 40a.

Using its control as operator of wells, TXO had repeatedly gone to extreme lengths secretly to cheat its lessors and other business partners out of royalties that TXO was contractually obligated to pay. For example, on one well in Texas, TXO was contractually committed to pay a one-eighth royalty to its lessors on "all oil and gas produced." Tr. 201, 211, 218-19, 226-28. For five years, however, TXO falsely represented to the royalty owners that *no* gas

was being produced, to reduce its payment to only $6.41 per year in "shut-in royalty checks." Tr. 191, 193, 204, 215; Pet. App. 22a-23a.[11]

The record further revealed that in 1988 TXO started production in Louisiana without first making an attempt to secure a lease from Carrie Calloway, "an elderly, functionally illiterate woman." Pet. App. 22a; Tr. 238, 249. Calloway's four acres gave her the right (after paying her share of costs) to 6/10ths of 1 percent of the gas from TXO's nearby well. Tr. 242-43. In late February 1988 her son had an attorney contact TXO to open negotiations about a possible lease of her rights to TXO. Tr. 235, 241. When TXO employees nevertheless arrived at her doorstep a week later to talk directly with her, she told them to contact her lawyer. Tr. 238. They persisted, falsely claiming that she had to sign a paper or else "her neighbors couldn't get paid for their oil and gas." She signed the paper. Tr. 239-40. Later that day, after learning what TXO had done, her son contacted the attorney, but because Mrs. Calloway's reading comprehension was limited to words like "cat" and "dog," and because TXO had failed to leave a copy of the paper, the attorney could not determine what she had signed. Tr. 235, 240. Suspecting that it was a lease, her attorney rushed to the registrar's office to block the filing of the paper, but discovered that TXO had beaten him to it, and had recorded a standard 1/8th royalty lease that stripped Mrs. Calloway of 7/8ths of her revenue rights from her own land.

The attorney then made a personal trip to TXO regional headquarters, confident that "this national company" was not "going to take advantage of Mrs. Calloway" over "such a small and insignificant part" of the gas rights and that the matter could be resolved amicably. Tr. 253. But the responsible supervisor said that he "didn't think his people had done anything wrong." Tr. 244. Her attorney was told: "[I]t's just a gamesmanship type

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[11] A woman living nearby happened to see a "flare burning on this well" and alerted the royalty owners, who discovered that "a tremendous amount of gas had been produced" during these five years. Tr. 191-92. Only after being sued did TXO make up the lost royalties. Tr. 200, 218. After TXO promised never to do it again, Tr. 217, 227, in 1990 the royalty owners discovered "the same thing again. They're tendering the shut-in royalty checks and the well's producing." Tr. 220.

thing." "If we can beat you, you know, we're going to beat you." Tr. 246.[12]

Further testimony revealed that even in its home state of Texas, TXO was not regarded "very well at all" by royalty owners. Tr. 202. It failed to honor written agreements. Tr. 263. Its infamous reputation for "failure to pay royalties" and "unfair practices" became so pronounced that landowners began writing oil and gas leases to bar any assignment of drilling rights to TXO. Tr. 274-75. Such was the evidence at trial.

TXO raised no relevant objections to the jury instructions and in fact was content to have punitive damages assessed against it under an instruction that provided no guidance at all to the jury. Nonetheless, on *Alliance*'s motion, the court issued an instruction that gave the jury much more guidance than its counterpart in *Haslip*. In closing argument, Alliance's counsel contended that the

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[12] Mrs. Calloway was forced to sue, and then to settle for only a 1/4th royalty from her land, Tr. 245, the victim of what her attorney called "trickery, chicanery, the worst type of deception." Tr. 245.

Several other examples of TXO's cheating of its royalty holders and other partners were presented at trial. *See, e.g.*, Pet. App. 22a; Tr. 264-65 (TXO refused to pay its partner its production share during the first year, giving it a "list of excuses a mile long," including "we don't know if the title's good to the tract" even though it had been "cured before the well was drilled." Although TXO clearly owed its partner $150,000 to $200,000, TXO threatened to sue its partner for $50,000 in expenses.); Tr. 265-66 (TXO greatly delayed royalty payments with a list of "novel excuses" like "we're not paying anybody," or "the computer's down, we just changed systems, the title hadn't been cured."); Tr. 267-69 (without any legitimate excuse, for several years TXO ignored its obligation to inform its partners of valuable excess gas that they had the right to sell, and instead sold the gas for its own profit.); Tr. 273-74 (TXO refused to pay royalty owners "for several years"; although they made repeated demands on TXO, "[it] just went on and on and on," and the royalty owners were forced to sue for the royalties.").

Similarly, other examples of TXO's fraud and blackmail tactics were presented at trial. For example, in Oklahoma TXO used "fraud and misrepresentation," Pet. App. 882, and "whatever it takes to get it done," Tr. 306, in beating out another company for the right to drill. TXO falsely "acted like it owned an interest to get somebody to give it an interest" so that it could obtain authority to drill. Tr. 302. Even after *this* interest lapsed, in a successful extortion move TXO filed legal protests against its rival, saying in effect, "I won't fight you and hold you up for two years and keep you from doing what you are entitled to do, if you will pay me off." Tr. 303. Then, TXO turned around and claimed that the concession it won entitled TXO to all of its rival's *other* drilling rights in the area. Tr. 304.

failure of TXO's scheme did not absolve TXO of blame, Pet. Br. App. 23a, and stressed, "We need to stop people from stealing other people's land. Fraudulent quit claim deeds. We need to stop this." Pet. App. 25a. After the verdict, TXO's scattershot post-trial motion listed 19 grounds, *one* of which was that the verdict was a "constitutional denial of due process and an excessive fine." TXO Post-Trial Brief at 6. In a hearing held on the record, the trial court made clear its reasons for deciding that the verdict was not excessive. Tr. 792-818.

On appeal, TXO procedurally defaulted its claim in the West Virginia Supreme Court, but the court nonetheless entertained it and provided a searching review based on its decision in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), which extends procedural protections beyond what *Haslip* requires. The court was hardly an unsympathetic audience for TXO: the opinion below was written by an outspoken *critic* of punitive damages lauded by the *Wall Street Journal* for his gusto in overturning punitive damages verdicts, and the court has proven its willingness to reverse or reduce such awards.[13] The court affirmed the award here as "necessary" to provide deterrence and retribution, based on "the potential harm [of] TXO's actions," "the maliciousness" of its conduct, and "the penalty necessary to discourage TXO from undertaking such endeavors in the future." *Id.* at 39a-40a. The court suggested that where a defendant has not "intentionally committed mean-spirited and harmful acts," *id.* at 39a, but has merely been "really stupid," i.e., has exhibited "extreme

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[13] *See* pp. 46-47, *infra*. *See also* Gordon Crovitz, "High Court Mumbled, But Punitives Are At Risk," *Wall St. J.*, Dec. 18, 1991, at A15 (reporting that Justice Neely's dismissal of several punitive damages cases "suggests that his state, which can't afford to scare off business, has had enough of arbitrary punitive damages" and quoting Neely's disapproval of the large verdict in *Pennzoil v. Texaco* and his criticism of punitive damages in products liability cases). Indeed, Justice Neely has warned of the economic harm of punitive damages in products liability cases, R. Neely, *The Product Liability Mess* 2 (1988), and has relied on the views of counsel for one of TXO's *amici* in his punitive damages decisions. *See Garnes*, 413 S.E.2d at 906-07. Prior to *Haslip*, Justice Neely had expressed concerns, as did many in the tort reform movement, that individual States lacked sufficient incentive to restrain damages awards. Justice Neely hailed *Haslip* as a "major step" in eliminating that problem, *Garnes*, 413 S.E.2d at 905, and in *Garnes* he enforced and indeed extended *Haslip*'s requirements.

carelessness," *id.* at 36a, it might enjoy — in addition to the procedural protections of *Garnes* — a substantive ceiling on its punitive damages exposure of five times the compensatory award. *Id.* at 38a. But in this case the court found that the acts were intentionally harmful, and so should not be governed by an automatic ceiling, but rather should lead to an award of the amount "required to cause the defendant to mend its evil ways and to discourage others similarly situated from engaging in like reprehensible conduct." *Id.* at 39a.

SUMMARY OF ARGUMENT

I. The award here satisfies substantive due process. In *Haslip*, this Court affirmed a punitive damages award more than 200 times the plaintiff's out-of-pocket expenses and an unknown multiple of the compensatory damages awarded. 111 S. Ct. 1037 n.2. Expressly disavowing the notion that there is some "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," *id.* at 1043, this Court instead approved a number of factors "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution." *Id.* at 1045. The award here easily passes muster under those factors: TXO's conduct was intended to inflict enormous harm, not only to respondents but also to other victims of TXO's "pattern of fraud, trickery, and deceit," Pet. App. 40a, and to society generally, which is threatened by such brazen attempts to undermine property and contract rights. TXO was a thoroughly reprehensible repeat offender whose highest officials authorized a deliberate and concealed scheme of land fraud and extortion. TXO's expected gain was as much as $8.3 million and warranted a correspondingly large award. Finally, the damages were entirely reasonable in light of TXO's financial position.

Because the award here is rationally related to the State's interests in deterrence and retribution, it cannot be called into question by the *ad hoc* "objective indicia" proposed by TXO. Moreover, TXO's "indicia" have no historical or constitutional basis. Punitive damages have traditionally borne "disproportionate" ratios to compensatory damages; indeed, one of their historical *raisons d'etre* is to provide a needed additional penalty *precisely where* compensatory damages are low but the potential for harm was

great. The award here was imposed by a jury and approved by West Virginia's courts, in accord with the allocation of authority established by the State constitution. To insinuate that such an award is presumptively "suspect," as TXO does, both denigrates the principles of federalism and disregards the historical role of the jury system.

II. Nor did the award here violate procedural due process. Almost all of TXO's arguments were not properly preserved, and in any event TXO's position rests on a caricature of the proceedings below. In truth, TXO received the benefit of *more* procedural protection than did the defendant in *Haslip* and more than TXO requested: extensive jury instructions proposed by *Alliance* rather than *TXO* that went far beyond the Alabama charge approved in *Haslip*; effectively "bifurcated" trial proceedings (Pet. Br. 3); post-trial review for excessiveness by a trial court that applied no lesser a standard than do Alabama judges; and appellate review by a court with a well-demonstrated proclivity for cutting damage awards that applied a more searching review than the Alabama Supreme Court. Indeed, even some of TXO's own *amici* acknowledge that TXO received its full entitlement under *Haslip*. Finally, TXO's "void-for-vagueness" argument has no merit and was squarely rejected by this Court in *Haslip*.

ARGUMENT

I. THE AWARD DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment requires punitive damages awards to be rationally related to a legitimate state interest — i.e., to be based on "plausible policy reason[s]" and not to have such an "attenuated" relationship to state interests as to be "arbitrary or irrational." *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992); *Burlington Northern R.R. Co. v. Ford*, 112 S. Ct. 2184, 2187 (1992). TXO flirts with various fuzzy and undefined variations on this theme, *see* Pet. Br. 12 ("rigorous" review); *id.* at 14 ("meaningful," presumably as opposed to "meaningless," review), and unabashedly relies on several *Lochner*-era precedents, Pet. Br.

12, that do not support its case[14] and that in any event have not provided the basis for *any* decision by this Court since the sea change exemplified by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In the end, however, TXO concedes that rational-basis scrutiny is the appropriate standard. *See* Pet. Br. 32. The award here easily meets that test.

A. The Award is Rational Under the Factors Outlined in *Haslip*

In *Haslip*, this Court approved a number of factors "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution," including:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 1045; see also the conclusions of law and economics scholars

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[14] *See Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347, 349-50 (1913) ($500 fine threatened to "intimidate" common carriers from "resorting to the courts to test the validity" of statutory maximum rates, since the only way to challenge the rate was to exceed it and face the consequences); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 489 (1915) (fine imposed with no notice that underlying conduct was unlawful); *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (penalty 113 times plaintiff's actual loss *permissible* because it need not be "confined or proportioned to . . . loss for damages").

in the Brief of West Virginia Trial Lawyers Ass'n as *Amicus Curiae* ("WVTLA Br."). Each of these factors supports the punitive damages award in this case.

1. The harm "likely to result" as well as actual harm

TXO tried to misappropriate between $5 million and $8.3 million in royalties from Alliance. Its assertion that the potential harm was slight because its misconduct "in no way decreased the value of respondents' property interest" (Pet. Br. 17) is a *non sequitur*; the slander of title was not an end in itself but simply the particular instrument employed to capture a highly profitable stream of royalties. The West Virginia Supreme Court found that TXO's illicit goal was relevant to the assessment of punitive damages, even if the tool it selected — slander of title — proved inadequate and thus turned out to cause respondents only $19,000 in harm. Moreover, the state court found that the extortion in this case "was not an isolated incident . . . but rather part of a *pattern and practice by TXO* to defraud and coerce those in positions of unequal bargaining power *vis a vis* TXO's superior legal firepower." Pet. App. 20a (emphasis added). *See* pp. 12-14, *supra*. The state supreme court specifically found that "an award of this magnitude [$10 million] is *necessary* to discourage TXO from continuing its pattern of fraud, trickery, and deceit," because "[t]he type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims." Pet. App. 40a (first emphasis added).

Not only did TXO's pattern of conduct threaten millions of dollars in loss to defrauded victims, but its chronic repudiation of contractual exchange and its willful attempts to undermine the property rights of others also injured the very market system on which commercial intercourse depends. *See* States' Br.; WVTLA Br. Indeed, the record in this case demonstrates that fraudulent quitclaim deeds of the kind used by TXO have been a particular source of concern in West Virginia. *See* p. 6, *supra*. Although it would of course be impossible to document a precise drop in economic production or in oil and gas drilling as a result of TXO's misconduct, States need not stand idly by as contract and property rights are subtly undermined until quantifiably widespread harm befalls their entire economies.

Drawing on the insights of Professor Clarence Morris,[15] the West Virginia Supreme Court rationally determined that behavior posing a danger of millions of dollars in harm warrants a commensurate award of punitive damages. *See Garnes*, 413 S.E.2d at 901-02. Justice Neely, who wrote the opinion below, explained in *Garnes* that, although "generally . . . punitive damages must bear a reasonable relationship to actual damages because compensatory damages provide a reasonable measure of likely harm," there is a "very narrow exception" to the "general rule" where "the actual harm was minimal but the potential harm was tremendous" and a jury "may reasonably find punitive damages commensurate with the potential harm." *Id.* at 908 & n.7; *see also* Pet. App. 39a. Even in such an instance, there is an "'understandable relationship,'" *Garnes*, 413 S.E.2d at 908 n.7 (quoting *Haslip*, 111 S. Ct. at 1045), between punitive and actual damages: the former must be high when the latter are low but there was great risk of harm. "For example, a gunman who attempts to rob a bank but fails and is captured may do little actual damage, but we certainly want to deter future gunmen. That is why the penalty in this state for attempted aggravated robbery is the same as for successful aggravated robbery." 413 S.E.2d at 908 n.7.[16]

2. *The degree of reprehensibility*

The West Virginia Supreme Court also explained how the award was amply justified on grounds of retribution, and TXO's assertion

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[15] *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1181 (1931) ("[T]he probable result is the measure of the 'seriousness' of [the defendant's] wrong. The actual result may have no bearing on this question. For example, the grossly negligent hunter may shoot into a crowd of people and only break a ten-dollar pair of eye glasses. The admonition meted out to him should be the same as though he had killed or injured someone. . . . In other words, it is the known tendency of acts which makes it desirable to prevent them, regardless of the particular results of any one commission.").

[16] The analogy to attempts in criminal law is a useful one; it is a subset of the general case in which the actual harm of a defendant's conduct is less than its potential for harm. For discussions of the deterrence-based rationales for punishing attempts, *see* WVTLA Br.; H.L.A. Hart, *Punishment and Responsibility* 129 (1968); R. Posner, *Economic Analysis of Law* 233 (4th ed. 1992); Shavell, *Deterrence and the Punishment of Attempts*, 19 J. Leg. Stud. 435, 436-37 (1990).

that the court's reasoning was "circular" (Pet. Br. 22) is based on quite selective quotation.[17] The "enormity of [TXO's] offence," *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), does not disappear simply because Alliance courageously resisted it, any more than a bank robber foiled by the bravery of a teller is somehow less culpable than one whose victims do not sound the alarm. Indeed, many would say that TXO is as morally blameworthy as a similarly situated intentional tortfeasor whose scheme succeeded.[18] Respondents need not go this far in order to establish that no judicially cognizable application of what TXO calls the principles of "just desert" and "proportionality" (Pet. 24-26) could possibly forbid the imposition of a $10 million punishment on a proven repeat offender: (a) who wrongfully tried to extort as much as $8.3 million; (b) who undermined the systems of contractual exchange and property rights that make possible oil, gas, and coal production in West Virginia; and (c) whose pattern of wrongdoing

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[17] TXO asserts that, "[w]ith respect to reprehensibility, . . . the West Virginia court offered only its observation that 'the jury's verdict says more than we can say in an opinion twice this length,'" and TXO maintains that the court's analysis was simply that "the size of the verdict justifies the size of the verdict." Pet. Br. 22. But TXO omits *the previous part of the sentence in the state court's opinion*: "As for the reprehensibility of TXO's conduct, we can say no more than we have already said," Pet. App. 40a: *i.e.*, that TXO had engaged in deliberate wrongdoing concealed for months; that its fraud and extortion were "not an isolated incident but part of a pattern and practice by TXO to defraud and coerce" those vulnerable to its "superior legal firepower," *id.* at 20a; and that the misconduct here was part of TXO's pattern of "deception and chiseling." *Id.* at 26a. The court's reference to the jury's verdict was simply a rhetorical flourish indicating that the court understood that the jury had reached the same conclusion, not a sign that the court was relying on the size of the verdict as proof of reprehensibility.

[18] *See* H.L.A. Hart *Punishment and Responsibility* 129-31, 258 (1968); H. Gross, *A Theory of Criminal Justice* 433 (1979); Shavell, *Deterrence and the Punishment of Attempts*, 19 J. Legal Stud. 435, 458 (1990); W. LaFave & A. Scott, *Criminal Law* 524 (2d ed. 1988) (noting range of penalties for attempt, "in some instances the same or even . . . higher" than penalties for successful offense); *cf.* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 58 (1982) ("The actual harm that occurred is at best a crude measurement of the moral egregiousness of a defendant's conduct . . . . [O]ne would not expect to find any correlation between egregiousness and the gravity of the injury sustained by the individual plaintiff.")

threatened "millions of dollars in damages to other victims." Pet. App. 40a. The award is certainly not "grossly out of proportion to the *possible* actual damages" of TXO's conduct. *Missouri Pacific*, 230 U.S. at 351 (emphasis added); *see also St. Louis, I. Mt. & So. Ry.*, 251 U.S. at 67; *cf. Harmelin v. Michigan*, 111 S. Ct. 2680, 2696-99 (1991) (opinion of Scalia, J.); *id.* at 2705 (opinion of Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2716 (White, J., dissenting). Any federal effort to second-guess the judgment of the West Virginia judicial system would necessarily be the sort of impressionistic, subjective decisionmaking that the Due Process Clause forbids and that would have far-reaching constitutional implications.[19]

TXO's argument rests on sleight of hand: it unjustifiably equates the gravity of the offense with "the wrong inflicted." Pet. Br. 26. But TXO assuredly *did* injure the system of contract and property rights in West Virginia. *See* WVTLA Br. And, as demonstrated by the 27 *Amici* States, a wrongful act with great potential for social harm can be punished — and punished harshly — regardless of whether in a particular case it does little or no injury. That is of course especially true where a wrongdoer does not abandon its attempt but completes it, and ends up doing little harm to its chosen victim only because of that victim's fortitude. Any other rule would cast existing state criminal sentencing schemes into constitutional doubt. *See* States' Br. Thus, TXO's argument entirely collapses once one corrects its faulty premise that it should be punished solely on the basis of Alliance's $19,000 in compensatory recovery.

3. TXO's expected gain

It is hardly irrational to say that TXO's vast expected profit is relevant to its punishment, even though Alliance did not knuckle under to the extortion. TXO need not be treated as if it intended to fail, causing Alliance only $19,000 in losses — any more than TXO

[19] An untethered "just desert" review would have severe implications for the civil forfeiture statute at issue in *Austin v. United States*, No. 92-6073 (*cert.* granted, Jan. 15, 1993), which governs wrongdoers themselves, not simply "innocent owners." *United States v. A Parcel of Land*, No. 91-781, 1993 U.S. Lexis 1782, *14 (Feb. 24, 1993) (plurality opinion) (noting long history of forfeiture laws).

would have been entitled to escape punishment had it succeeded in stealing the land, only to find that it in fact did not contain economically recoverable natural gas, or any more than a thief who purloins an expensive watch but is apprehended before he can "fence" it must be treated as if he had no expected gain. Indeed, many authorities, including TXO's own *amici*, explain that "courts may evaluate the jury's award for excessiveness using the amount of a defendant's actual *or anticipated gain from his misdeeds*."[20] Punishment on the basis of expected gain is especially necessary where a defendant tries to take a "thin-market" asset with no standard price quotation, like an interest in oil and gas production, rather than an asset in a "thick" market, such as an individual share of publicly traded stock.[21]

TXO concedes that its expected gain must be adjusted upward by the *ex ante* probability that it would have escaped detection and punishment. Pet. Br. 28-29; *see also* Insurers' Br. at 16. TXO, however, is incorrect in equating this probability with the ease of concealment. Pet. Br. 29. To the contrary, underenforcement was likely here for several reasons: (1) TXO no doubt expected the smaller Alliance simply to buckle in August 1985 under the weight of the phony quitclaim deed and TXO's extortionate threats; (2) TXO's declaratory judgment action, though frivolous, might well have succeeded if TXO had been able to obtain the false testimony

[20] Brief *Amici Curiae* for The American Council of Life Insurance, et al. ("Insurers' Br.") at 6 (emphasis added); *id.* at 15-16 ("the expected profits where the defendant fails to profit as expected"); *see also* Brief of the American Tort Reform Association, et al., as *Amici Curiae*, at 3, 12, 16 ("the *anticipated* or actual gain to the defendant"; "the actual or *potential gain* to the defendant"; "the greater the *anticipated gain* from a tort, the greater the penalty needed to provide appropriate disincentives for its commission"); *Cummings Medical Corp. v. Occupational Medical Corp. of Am., Inc.*, 13 Cal. Rptr. 585, 590 (Cal. App. 2 Dist. 1992); R. Posner, *Economic Analysis of Law* 209-10, 220 (4th ed. 1992); W. Landes & R. Posner, *The Economic Structure of Tort Law* 160-61 (1987); Landes & Posner, *An Economic Theory of Intentional Torts*, 1 Int'l Rev. L. & Econ. 127, 135 (1981).

[21] *See* WVTLA Br.; Haddock, McChesney, & Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Calif. L. Rev. 1, 18-19 & n.54, 29-30 (1990); Toy, Note, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L.J. 303, 307-08 (1991); McChesney, *Deception, Trademark Infringement, and the Lanham Act: A Property-Rights Reconciliation*, 78 Va. L. Rev. 49, 54 (1992).

that it sought, *see* p. 8, *supra*; (3) even after TXO's suit was dismissed, respondents faced daunting barriers in proving malice and overcoming TXO's advice-of-counsel defense; and (4) TXO's deceit continued even into the trial. *See* pp. 11-12, *supra*. While the probability that TXO would have escaped punishment is difficult to quantify, it was from an *ex ante* perspective clearly significant (or else TXO would not have invested so much time and effort in the scheme), and a substantial upward adjustment in the damage award was amply warranted.[22]

4. TXO's financial position

TXO cannot dispute the reasonableness of the award in light of its wealth: the award amounts to less than 0.4 percent of Texas Oil & Gas Corp.'s net worth (between $2.0 and $2.5 billion, Tr. 354). Tr. 354. "[R]esearch reveals that a typical ratio for a punitive damages award to a defendant's net worth may be around one percent." *Cash v. Beltmann North Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990). Although at trial TXO objected to the evidence regarding wealth, it was properly admitted, *see* pp. 39-40, *infra*, and TXO introduced no contrary evidence on the topic at any stage of this case. TXO's sole substantive due process argument with respect to wealth is that the Fourteenth Amendment should be re-interpreted to require that a defendant's wealth not be considered at all in assessing the reasonableness of punitive damages. Pet. Br. 23, 27 n.25, 30 n.30. We refute this claim at pp. 36-39, *infra*.

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[22] TXO's claim that the award is so disproportionate that it will "overdeter" lawful conduct is veiled *Lochnerism*, not "narrow means-end testing" (Pet. Br. 28 n.27), since the West Virginia courts have rationally upheld this award as *necessary* for deterrence and not excessive and because "society has an interest in deterring and punishing *all* intentional wrongdoing." *Smith v. Wade*, 461 U.S. 30, 54 (1983) (emphasis in original). TXO's assertion that "the decision below expressly recognized the problem of overdeterrence" (Pet. Br. 28 n.26) relies on an out-of-context quotation in which the state court explained that the *substantive elements* of the slander-of-title tort already address the risk of overdeterrence. There are strong reasons to believe that the risk of overdeterrence is quite low in the case of intentional torts, *see* WVTLA Br., and where to strike the balance is in any event a matter for West Virginia to decide.

5. The remaining Haslip *factors*

TXO does not contend that the award is excessive under the other factors mentioned in *Haslip*.

* * *

In sum, the award in this case is fully commensurate with the potential for social harm and TXO's expected gain. By TXO's own accounting, it risked an upward adjustment by a factor of somewhere between 2 and 10 to account for the likelihood of underenforcement. Pet. Br. 30 n.31. The 526:1 ratio between the punitive damages and the $19,000 in attorney's fees necessary to defeat TXO's scheme is of no constitutional significance.[23]

B. A Punitive Damages Award That is Rationally Related to Deterrence and Punishment Is Not Unconstitutional Simply Because It Is Large or Because It Bears a High Numerical Ratio to a Plaintiff's Out-of-Pocket Loss

The punitive award in this case was necessary to deter wrongdoing by TXO and by others, was appropriate retribution, and otherwise meets the criteria outlined in *Haslip*. That should end the matter with respect to substantive due process. Indeed, such a conclusion is compelled by the very "means-end" testing that TXO champions, Pet. Br. 28 n.27, 31-33: if the award is a rational means to the State's end, it does not violate due process — *Q.E.D.* Accordingly, no reported decision of any tribunal — even in the days of *Lochner* — has ever invalidated as "excessive" a punitive damages award found necessary to deter wrongdoing and to serve as appropriate retribution.

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[23] *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1182 (1931); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991); *Southern Life & Health Ins. Co. v. Turner*, 586 So.2d 854, 858 (Ala. 1991); *Hospital Auth. v. Jones*, 409 S.E.2d 501, 502-03 (Ga. 1991), *cert. denied*, 112 S. Ct. 1175 (1992). Even opponents of punitive damages agree that a ratio rule would be inappropriate. *See* Brief of Arthur Andersen & Co., et al., as *Amici Curiae* in Support of Petitioner, at 13.

1. Historically, punitive damages have often been far in excess of a plaintiff's compensable loss

As an historical matter, punitive damages arose in cases where a plaintiff had suffered little compensable loss, but the need for deterrence and punishment dictated an additional award — producing precisely the sort of lopsided ratios between punitive and compensatory damages that TXO finds so disturbing. Thus, while at common law there was an "understandable" relationship between punitive and compensatory awards, *Haslip*, 111 S. Ct. at 1045, there was no mathematical one. "[T]he practice of awarding damages *far in excess of actual compensation* for quantifiable injuries was well recognized" in the eighteenth century. *Browning-Ferris Indus. v. Kelco, Inc.*, 492 U.S. 257, 274 (1989) (emphasis added).[24] In perhaps the earliest punitive damages case in the

[24] For example, in *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), the victim of an illegal search requested "large and exemplary damages" on the ground "that trifling damages would put no stop at all to such proceedings," *id.* at 490, and received £1,000 after Lord Chief Justice Pratt explained to the jurors that they "have it within their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter any from proceeding in the future, and as a proof of the detestation of the jury to the action itself." *Id.* at 498-99 (emphasis added). In *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), the court approved an award of exemplary damages of £300 to a journeyman printer falsely imprisoned for six hours by an official who "used him very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damages." *Id.* at 768. In *Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814), the court asked, "[I]n a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?" The court rejected the notion that "the jury are not justified in giving more than the absolute pecuniary damage that the Plaintiff may sustain." *Id.* at 761. *See also Sears v. Lyons*, 171 Eng. Rep. 658 (K.B. 1818) (property damage); *Hewlett v. Cruchley*, 128 Eng. Rep. 696, 697 (K.B. 1813) (£2,000 verdict for malicious prosecution where out-of-pocket costs were £100); *Bruce v. Rawlins*, 95 Eng. Rep. 934, 934 (C.P. 1770) (£100 for illegal search that "did little or no damage"); *Benson v. Frederick*, 97 Eng. Rep. 1130, 1130 (K.B. 1766) (£150 for whipping, even though the plaintiff was "not hurt much indeed"); *Tullidge v. Wade*, 95 Eng. Rep. 909, 909 (C.P. 1769) (although plaintiff's loss was no more than twenty shillings, verdict of £50 upheld, and "[i]f the jury had given £100 damages, [the judge] should not have thought them too much").

A prominent early justification for punitive damages was their role in deterring acts that carried great potential for social harm, even though the

United States, the jury was instructed "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake, to prevent such offences in the future." *Coryell v. Colbaugh*, 1 N.J.L. 77, 77 (1791). In language squarely applicable here, another court explained that "the damages should be in proportion to the degree of malice, and should not be restricted to a mere compensation for the injury actually done, however short it may be of the injury *intended*," and a defendant should not "be protected from exemplary damages, because the plaintiff's high character made the assault harmless." *Gilreath v. Allen*, 32 N.C. 67, 70 (1849) (emphasis in original). The pattern continued up to the framing of the Fourteenth Amendment in 1868 and afterwards.[25]

particular plaintiff had himself suffered little injury. For example, Coke argued that libel against a private person "deserves a severe *punishment*" because it "incites . . . quarrels and breach of the peace." *de Libellis Famosis*, 5 Co. Rep. f.125a (1607); *see also* 5 W. Holdsworth, *History of English Law* 211-12 (1924); *Grey v. Grant*, 95 Eng. Rep. 794, 795 (C.P. 1764) ("when a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages" of £200 for a battery that caused no injury in the case at bar).

[25] *See New Orleans, J., & Great N.R. v. Hurst*, 36 Miss. 660, 667 (1859) ($4,500 where plaintiff suffered no out-of-pocket loss); *Reed v. Davis*, 4 Pick. 216, 217 (Ma. 1826) ($500 where "little or no damage done"); T. Sedgwick, *Measure of Damages* 531 (4th ed. 1868) (reporting case of $3,000 punitive for actual loss of $20); *Edwards v. Beach*, 3 Day 447, 450 (Conn. 1809) (amount of injury to property "is not the only ground of damages"; were it so, "a person so disposed might forcibly dispossess another of article of property at his pleasure, and compel the owner . . . to accept of the value in its stead"); *Dorsey v. Manlove*, 14 Cal. 553, 556 (1860); *Clark v. Bales*, 15 Ark. 452, 459 (1855); *Treat v. Barber*, 7 Conn. 274, 279 (1828); *Linsley v. Bushnell*, 15 Conn. 225, 236 (1842); *McNamara v. King*, 2 Gilm. Ill. R. 432, 436 (1845); *Whipple v. Walpole*, 10 N.H. 130, 132-33 (1830); *Taylor v. Grand Trunk R.*, 48 N.H. 304, 318-19 (1869); *Lynd v. Pickett*, 7 Minn. 184, 200-01 (1862); *McWilliams v. Bragg*, 3 Wis. 424, 426-29 (1854); *Parsons v. Harper*, 57 Va. 64, 78 (1860); *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 294 (1892). Punitive damages were also employed to "discourage [the] repetition" of acts with large potential for social harm, irrespective of whether the potential was realized in the individual case. *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 460-61 (1877); *see also Whipple*, 10 N.H. at 132-33.

Whatever the interests that society has deemed to be important objects of legal protection,[26] punitive damages have often borne dramatic ratios to their compensatory counterparts. If there is a "proportionality principle" to be extracted from the common law, it is that punitive damages need not be "proportional" to out-of-pocket loss, but rather "proportional" to the amount necessary to deter the defendant and to serve as appropriate punishment. *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 19 (1982).

2. TXO's proposed "indicia" do not render the award suspect

Incredibly, TXO simply shunts aside the factors approved in *Haslip* "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution," 111 S. Ct. at 1045, and proposes its own supposedly "objective indicia," Pet. Br. 16, whose chief appeal and theoretical foundation seems to be TXO's fervent hope that it can show that the award in this case does not meet them. But for over two centuries common-law courts have imposed punitive damages where necessary with barely any *mention*, let alone *application*, of TXO's "indicia." Moreover, the proposed criteria make no constitutional sense because they are crude and arbitrary measures disconnected from the *purposes* of punitive damages. They contradict TXO's *own* claim that justice requires punishment to be tailored to the individual facts and circumstances of the offense (Pet. Br. 24-27), rather than to wooden rules such as awards against *different* defendants in *different* locales under *different* circumstances. None of the indicia can properly be used to call into question the award in this case.

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[26] The issue is not whether the same types of injuries (to honor or reputation, for example) are at issue here as were at issue in eighteenth century English decisions; societies and causes of action change over time. "Although the precise nature and use of punitive damages may have evolved, . . . the concept of 'punitive damages' has a long pedigree in the law," *Molzaf v. United States*, 112 S. Ct. 711, 715 (1992), as does the principle that punitive damages may greatly exceed compensatories. In any event, punitive damages have long been available in cases involving fraud and injuries to property interests. *See, e.g.*, Auto Br. 10-13; G. Field, *Law of Damages* 67-68 (1876); 3 J. Sutherland, *Law of Damages* 471-72, 520, 593 (1883); *Whipple*, 10 N.H. at 131.

An award that rationally serves a State's interests, for example, cannot be said to violate due process simply because it happens to be larger than those typically awarded in that State — any more than an award that was *not* rationally related to any state interest would be constitutional merely because it was in line with past awards in that jurisdiction, or any more than the prior awards that TXO would use as its benchmarks were themselves unconstitutional because they were record-setting sums at the time of their decision. West Virginia's history records no prior punitive damages case involving a defendant like TXO. To say that the State's courts are disabled from imposing an appropriate award in this case because they have steadfastly resisted substantial awards in *other* cases is to penalize restraint and to send a dangerous signal to potential wrongdoers everywhere that punitive damages are capped by the pre-existing awards in a given jurisdiction.

TXO proposes an inter-jurisdictional comparison (Pet. Br. 16), but if its own *amici* are to be believed, punitive awards in other States have reached astronomical levels — indicating that such a comparison would validate rather than undermine the award here. TXO cites slander-of-title decisions, but the amount needed to deter slander regarding plots of ordinary land is obviously not the same as that necessary with respect to lucrative oil and gas tracts worth many millions. Moreover, the cases cited by TXO do not support its argument; they show that, based on the egregiousness of the wrongdoing, courts often uphold awards *far greater than* a defendant's expected gain.[27] In any event, TXO should be compared not simply to one-time title slanderers but to defendants with long histories of deceit and fraud who scheme to misappropriate millions of dollars; the *amicus* briefs on both sides confirm that such defendants are typically subject to even greater punishments than the award meted out in this case. Indeed, the

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[27] *See Soneff v. Harlan*, 712 P.2d 1084, 1086-88 (Colo. Ct. App. 1985) (unsuccessful attempt to evade purchase and sale agreement and seize control of building worth $80,000 punished by award of $800,000); *Johnston v. Doran*, 540 P.2d 306, 307, 309, 311-12 (Mont. 1975) (attempt by real estate broker to "move in" on another broker's clients and defraud them punished with award more than 3 times expected gain of $14,000); *Summa Corp. v. Greenspun*, 655 P.2d 513, 517 (Nev. 1983) (failed effort to harm newspaper owner punished with $1 million award, even though defendant had no expected pecuniary gain).

West Virginia Supreme Court compared the award in this case to all post-*Haslip* decisions, Pet. App. 35a, and found that it was not excessive.

Moreover, TXO's approach ignores the special needs of different States, such as West Virginia's historic concern with fraudulent quitclaim deeds and its strong interest in ensuring the orderly exploitation of its natural resources. There is no warrant in the Due Process Clause for specifying by judicial fiat the weight that an individual State must give to such factors, and it should be underscored that the 27 *Amici* States staunchly oppose TXO's proposed inter-jurisdictional comparison test as a basic affront to federalism. This Court has already recognized the constitutional flaws in TXO's proposed test.[28]

Finally, there is no basis for calling the award into question on the ground that West Virginia statutes provide for treble damages for waste and carrying away trees from another's land, Pet. Br. 19 n.17 (as if TXO's multi-million-dollar scheme could be compared to those acts), and imposes relatively low criminal fines for larceny, theft, and fraud. In this case, TXO has been assessed no more (and almost certainly less) than three times its expected gain or potential harm. But that is not the real point. Imprisonment is not an available punishment in a civil case, and a much higher monetary sanction is required to deter. *See Haslip*, 111 S. Ct. at 1046. Because the States rely on punitive damages to encourage the private enforcement of the laws, their legislatures are able to reduce public enforcement or maintain low criminal penalties precisely because of the deterrent effects of punitive damages. TXO concedes that there

[28] *See Harmelin v. Michigan*, 111 S. Ct. 2680, 2696-99 (1991) (opinion of Scalia, J.); *id.* at 2704, 2707 (Kennedy, J., concurring in part and concurring in the judgment); *Rummel v. Estelle*, 445 U.S. 263, 281-82 (1980). Moreover, in criminal law cases like *Harmelin* and *Solem v. Helm*, 463 U.S. 277 (1983), it is usually possible to determine with some precision the sentence a defendant would have received in other jurisdictions. But a jury imposing punitive damages must make an essentially *qualitative* assessment based on all the facts and circumstances of a particular case — a process that quite naturally and properly leads to "disparate outcomes," *Haslip*, 111 S. Ct. at 1055 (Kennedy, J.), and more particularly makes it impossible to say *what* penalty the defendant would have received in a different jurisdiction. That a jury in a certain State assessed a particular sum in a different slander of title case says nothing about whether TXO would have been assessed $10 million, or more, or less, if its case had been tried in that jurisdiction.

is no statutory limit on punitive damages in slander of title cases applicable here. As the 27 *Amici* States stress, this Court should respect state-established allocations of authority between legislative and judicial branches. It should not, in the name of the West Virginia legislature, impose a restriction on the State's judicial system that the West Virginia legislature has not itself imposed.

3. *An award is not suspect simply because it is imposed by a State through its judicial system rather than through its legislature*

An otherwise rational award is not suspect merely because it is imposed by a court. As Dean Griswold concedes, "[e]ven in the absence of legislative guidance, punitive damages awards that bear a rational relationship to the purposes of deterrence and punishment may not be so excessive and arbitrary as to deprive a defendant of due process of law." Insurers' Br. at 14; *see also Haslip*, 111 S. Ct. at 1046; *St. Louis, I. Mt. & So. Ry.*, 251 U.S. at 67. Even TXO does not specify the precise increase in scrutiny that it believes is appropriate in cases involving jury awards.

The States have a strong interest in relying on jury-imposed punitive damages awards to enforce state laws. *See* States' Br. TXO's assertion that its punishment was "meted out by a single jury," Pet. Br. 14, is simply false. The award here was imposed by the State's *judicial system* after review by two state courts, in accord with the allocation of authority established by the state constitution. TXO cannot dismiss that arrangement so lightly,[29] and its complaint that its award was not approved by "the elected representatives of the States' citizens," *id.* at 13, rings hollow since

[29] To treat the jury system as suspect ignores the role of the constitution in establishing it, W. Va. Const. Art. III, § 14, of the people in ratifying the arrangement, and of the ability of the executive and legislature to limit jury awards. More importantly, it intrudes on the constitutionally protected authority of the States to govern themselves and to "structur[e] their governments" free from federal interference. *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 832 (1992); *see New York v. United States*, 112 S. Ct. 2408, 2418, 2421, 2432-33 (1992); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991); *cf. Growe v. Emison*, No. 91-1420 (Feb. 23, 1993) (federal courts must defer to state apportionment procedures, whether undertaken by state courts or state legislatures).

the Justices of West Virginia's highest court *are in fact elected*.

This Court has often noted the critical governmental role played by the jury in administering justice in individual cases. *See, e.g., Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991). Indeed, tailoring punishment to the facts and circumstances of a given case is not a process that works to the inherent disadvantage of defendants; if the West Virginia legislature had provided that punitive damages should be set categorically at three times the defendant's expected gain, would TXO now be arguing that its $24.9 million punitive damage verdict was a violation of due process for lack of individualized determination? TXO's demand for strict review of jury awards, like the premise of its procedural due process and void-for-vagueness arguments that a jury must be severely constrained by certain unspecified standards, is utterly irreconcilable with its plea to judge the award by the standards of history, for setting the proper damages "has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day v. Woodworth*, 54 U.S. at 371.[30] TXO's argument would

[30] *See Townsend v. Hughes*, 86 Eng. Rep. 994, 994-95 (C.P. 1677) (court "could neither lessen the sum [of damages] nor grant a new trial, . . . since by the law the jury are judges of the damages"); *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764) ("in cases of tort the jury are the only proper judges of the damages" and explaining that new trials were granted only in cases of jury misbehavior); *Duberley v. Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792); *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C.P. 1780); *Fabrigas v. Mostyn*, 96 Eng. Rep. 549, 549 (C.P. 1774); *Hewlett v. Cruchley*, 128 Eng. Rep. 696, 698 (K.B. 1813).

See also Missouri Pacific R.R. Co. v. Humes, 115 U.S. 512, 521 (1885); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886); *Minneapolis & St. Louis R.R. Co. v. Beckwith*, 129 U.S. 26, 36 (1889); *Dorsey v. Manlove*, 14 Cal. 553, 556 (1860) (in punitive damages cases, "the measure and amount of the damages are matters for the jury alone"); *Sheik v. Hobson*, 64 Iowa 146, 148 (1884) ("the question whether punitory damages shall be assessed, and the amount of the assessment, is left to the discretion of the jury"); *McNamara v. King*, 2 Gilm. Ill. R. 432, 436 (1845); *Schlencker v. Risley*, 4 Ill. 483, 487 (1842); *Taylor v. Giger*, 3 Ky. 586, 587 (1808); *North v. Cates*, 5 Ky. 591, 593 (1812); *New Orleans, J., & Great N.R. v. Hurst*, 36 Miss. 660, 666-67 (1859); *Vunck v. Hull*, 3 N.J.L. 814, 816 (1809); Field, *supra*, at 65; Sedgwick, *supra*, at 537-38 n.1; 1 Sutherland, *supra*, at 742; 3 Sutherland, *supra*, at 661; Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L. Rev. 859, 899-900 (1991).

undermine the traditional role of the jury in many areas of the law and should therefore be rejected.[31]

II. THE AWARD DOES NOT VIOLATE PROCEDURAL DUE PROCESS

TXO's procedural due process objections are completely misplaced. In truth, TXO received *more* process than it requested and more than *Haslip* directs — as its own *amici* candidly admit. *See* Brief of Continental Cas. Co. at 5; Brief of CBS, Inc. at 17, 19. Moreover, *Haslip* did not incorporate into the Fourteenth Amendment the particular details of Alabama's system for awarding punitive damages. It merely upheld a state scheme that, *as a totality*, imposed "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." 111 S. Ct. at 1045; *see Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1386 (5th Cir. 1991). In the context of actions for civil penalties between private parties, this Court has steadfastly declined to use the Constitution to add specific new procedural devices to the traditional requirements of notice, a meaningful opportunity to be heard, and a neutral decisionmaker. *See Haslip*, 111 S. Ct. at 1046 n.11; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989); *United States v. Halper*, 490 U.S. 435, 450 (1989). TXO's formalistic objections provide no warrant for enacting "a rigid constitutional code of procedural necessities." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985).

[31] *See* States' Br; Brief of Consumers Union as *Amicus Curiae*. As this Court noted in *Haslip*, juries are routinely afforded much greater discretion "in many familiar areas of the law as, for example, deciding 'the best interests of the child,' or 'reasonable care,' or 'due diligence,' or appropriate compensation for pain and suffering or mental anguish." 111 S. Ct. at 1044. Noneconomic awards for pain and suffering, for example, frequently run into the millions of dollars, yet "there is no clear method for measuring the loss and determining the amount of compensation due." *Samsel v. Wheeler Transp. Servs.*, 789 P.2d 541, 552 (Kan. 1990). "[T]he alleged due process objection to punitive damages once again calls into serious question other established rules of tort law." Riggs, *supra*, at 908.

A. The Jury Instructions Satisfied Due Process

1. TXO's claims are not properly presented

TXO's new-found objections to the jury charge were not presented below and are not properly included within the second question presented. TXO made no relevant objection at trial[32] and *did not raise either aspect of the jury instruction* in its arguments before the West Virginia Supreme Court. Accordingly, the decision below addresses *neither* instruction of which TXO now complains.[33] Indeed, TXO *specifically conceded* that "[i]t is clear under West Virginia law that the financial standing *of the defendant* is an element to be taken into consideration in determining the proper measure of punitive or exemplary damages," State Ct. Br. at 37 (emphasis in original), and certainly did not suggest that this rule was a violation of due process. This Court's "pressed or passed on" rule is not met. *Bankers Life*, 486 U.S. at 77.

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[32] At trial, TXO broadly objected to the mention of wealth in the jury instruction but made no reference to "due process," "the Fourteenth Amendment," or even the "federal Constitution." J.A. 34. Accordingly, TXO did not properly frame a federal claim. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). Also at trial, TXO raised *no objection at all* to the instruction permitting the jury "to provide additional compensation for the conduct to which the injured parties have been subjected," J.A. 34, and in fact argued to the trial court that "it is clear under West Virginia law . . . that punitive damages can both serve a compensatory and a penalty function." TXO Post-Trial Br. at 42. TXO's objection is now barred by West Virginia law. *See Shia v. Chvasta*, 377 S.E.2d 644, 646 (W. Va. 1988).

[33] The decision below discusses *only* TXO's argument that the *admission of evidence* concerning the financial condition of TXO Production Corp. was in error as a matter of *state law* "under the fifth criterion from Syllabus Point 3" (Pet. App. 40a) of *Garnes* — not because wealth is a constitutionally impermissible criterion but because "[t]he [trial court supposedly] erred by allowing the jury to assess punitive damages based upon testimony as to the combined net worth of the 'TXO Division' of a remote parent corporation, comprised of 15 non-party companies, rather than upon the net worth of TXO Production Corporation." Brief of Appellant TXO before the West Virginia Supreme Court ("State Ct. Br.") at 8 (section entitled "[t]he assignments of error relied upon on appeal").

Nor are TXO's new-found objections properly contained in the second question presented to this Court.[34] Thus, even if respondents had not preserved the matter of TXO's waivers in their Opposition, they would be entitled to raise the issue now. In fact, however, respondents *did* preserve the waiver issue, by noting in the Opposition that, "*in spite of TXO's own failures to raise issues below*, it received all the protection of due process to which it is entitled." Opposition at 14 (emphasis added).

2. TXO was accorded more procedural protections by the jury instructions than Haslip *requires and more than TXO requested*

TXO concedes that "[t]he jury here was provided with more information than was the jury in *Haslip*." Pet. Br. 35. Indeed, the instructions here (J.A. 34-35) (1) required the jury to make an additional finding of malice; (2) required the jury to examine evidence favorable to TXO, by directing it to weigh "any mitigating circumstances which may operate to reduce the amount of the damages"; (3) instructed the jury to consider additional factors not enumerated in *Haslip*, including "the extent of the harm inflicted," "the intent of the party committing the act," and "all of the circumstances surrounding the particular occurrence"; and (4) avoided ambiguities in the *Haslip* instructions, such as the phrase "the character and degree of the wrong," as well as the troubling instruction (*see* 111 S. Ct. at 1057 (O'Connor, J., dissenting)) that punitive damages were "entirely discretionary with the jury." The instructions in the instant case were more than TXO requested and far surpass those upheld by other courts in the wake of *Haslip*.[35]

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[34] The petition itself discussed only the alleged deficiencies in the post-trial and appellate review, and made no mention of the jury instructions, admission of evidence, the wealth of the defendant, or the reference to a need for additional compensation.

[35] *Alliance* proposed this instruction at the close of the jury charge conference. For its part, TXO was content to have the jury assess punitive damages under an instruction that provided *no guidance at all*. J.A. 25. Indeed, TXO waived an opportunity proffered by the trial judge to instruct the jury that any punitive damages were required to be reasonably proportional to compensatory damages. J.A. 32-33. Those who choose not to avail themselves of procedural safeguards have no basis for complaining of a

The jury instructions, however, were not the only procedural protection that TXO received over and above *Haslip*'s requirements. Although TXO did not request a separate punitive damages proceeding pursuant to West Virginia Rule Civ. P. 42(c), its quiet title action and the counterclaim for slander of title were, in TXO's words, "bifurcated." Pet. Br. 3; *cf. Haslip*, 111 S. Ct. at 1064 (O'Connor, J., dissenting). TXO would not have been liable for *any* damages, let alone punitive damages, if it had prevailed in a critical segment of the liability determination — the quiet title bench trial before Judge Stephens.[36]

3. *TXO's attacks on the jury instructions have no merit*

a. *The Fourteenth Amendment does not prohibit a State from permitting juries to consider a defendant's wealth in assessing punitive damages*

Like 36 other States, *see* attached Appendix, West Virginia has quite rationally determined that the jury may consider a defendant's wealth because of the declining marginal utility of money — the

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deprivation of due process. *E.g.*, *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 39 n.21 (1990). For less detailed instructions, see *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991); *Viking Ins. Co. v. Jester*, 836 S.W.2d 371, 379 (Ark. 1992); *K-Mart Corp. v. Pearson*, 818 S.W.2d 410, 417 (Tex. Civ. App. — Houston [1st Dist.] 1991); *General Motors Corp. v. Saenz*, 829 S.W.2d 230, 241 (Tex. Civ. App. — Corpus Christi 1991); *Burke v. Deere*, 780 F. Supp. 1225, 1239 (S.D. Iowa 1991); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097 (5th Cir. 1991); *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1176 (11th Cir. 1991); *Medical Mut. Liab. Ins. Soc'y v. B. Dixon Evander & Assoc., Inc.*, 609 A.2d 353, 368 n.14 (Md. App. 1992); *Fraidin v. Weitzman*, 611 A.2d 1046, 1066 (Md. App. 1992).

[36] Moreover, Judge Stephens' decision that, "as a matter of law, . . . there is no ambiguity in the deed[s]" (J.A. 17) that established Tug Fork's title (and hence Alliance Resources' title) did not automatically render TXO liable for damages. Alliance *still* was required to prove all of the rigorous elements of slander of title, including notice. J.A. 23-24, 26. Even then, Alliance was required to overcome TXO's various affirmative defenses — which invited the jury to decide that, despite Judge Stephens' previous ruling that the deed was unambiguous as a matter of law, TXO subjectively believed otherwise, J.A. 25, 31 — *and* to establish all of the prerequisites for punitive damages. J.A. 34-35.

judgment that the disutility caused by the loss of $1 is less for a wealthy defendant than for a poor one[37] — and because a bigger award is needed to "attract the . . . attention" of a large corporation for reasons of organizational dynamics.[38] These policy judgments are well within a State's authority to make and indeed are fully consistent with: the Restatement (Second) of Torts § 908(2) & comment e (1977); decisions of the "vast majority of courts" to consider the matter, *Punitive Damages: Relationship to Defendant's Wealth*, 87 A.L.R.4th 141, 151 (1992); and the views of leading commentators. *See* W. Prosser, *Handbook of the Law of Torts* § 2, at 14 (4th ed. 1971); D. Dobbs, *Law of Remedies* § 3.9, at 218-19 (1973). In the Eighth Amendment context, Justice O'Connor, joined by Justice Stevens, has already rejected TXO's position, *see Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., concurring in part and dissenting in part), and the argument is no stronger when cloaked in the language of due process. Furthermore, TXO's position is, "as a historical matter, . . . weak indeed," *ibid.*, for juries have considered defendants' wealth for hundreds of years,[39]

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[37] *See* R. Posner, *Economic Analysis of Law* 227-28, 232 & n.3 (4th ed. 1992); A. Sen, *On Economic Inequality* 83-85 (1973); *Robertson Oil Co. v. Phillips Petroleum Co.*, 779 F. Supp. 994, 997 (W.D. Ark. 1991). Asked to compare the salaries of present-day baseball players with the relatively meager pay of his time, Mickey Mantle recently said, "You know what really makes me mad — they still fine these guys the same thing they fined us. Me and Billy [Martin] got fined $500. That was a lot of money [to us]. If I was making $5 million I'd say, 'Here, take another.'" *Larry King Live*, CNN, April 16, 1991.

[38] *See* Pet. App. 36a-38a, 39a; *see also Garnes*, 413 S.E.2d at 910; *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 78 (W. Va. 1986). This is a facet of the well-documented "agency" problem of corporate management, which exposes the flaw in TXO's assumption (Pet. Br. 27 n.25) that corporations are simply abstract conduits of dividends to shareholders. *See* Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership*, 3 J.Fin.Econ. 305 (1976); *Morrisey v. Curran*, 650 F.2d 1267, 1273 (2d Cir. 1981). The logic behind West Virginia's rule is akin to the justification for *respondeat superior* upheld in *Haslip*. *See* 111 S. Ct. at 1041.

[39] *See, e.g., Washington Gas Co. v. Lansden*, 172 U.S. 534, 551 (1899); *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C.P. 1780); *Bodwell v. Osgood*, 3 Pick. 379, 385 (Ma. 1825); *McNamara v. King*, 2 Gilm. Ill. R. 432, 436 (1845); *McAulay v. Birkhead*, 35 N.C. 28, 31-32 (1851); *New*

in accord with the views of such notables as Kant, *see The Metaphysical Elements of Justice* 101 (J. Ladd trans. 1965), and Blackstone, *see* 4 W. Blackstone, *Commentaries* *371. A few States have restricted (especially by procedural devices) the consideration of a defendant's wealth, in self-conscious efforts to go beyond what due process requires.[40] Pet. Br. 37. But this simply corroborates the statement by the 27 *Amici* States that there are important policy choices and different procedural options that militate against a rigid constitutional rule.

Nor is the particular instruction here suspect. *Haslip* did not of course invalidate the longstanding rule that "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981). *Haslip* indicated merely that a scheme in which the factfinder was instructed to award damages *only* on the basis of a defendant's net worth would be questionable. *See* 111 S. Ct. at 1045. The jury instructions here did not suffer from that flaw; they directed the jury to consider wealth *as one factor among many* and to consider wealth not in the abstract but *only in the specific context of deterrence*: "the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary

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Orleans, J. & Great N. R. Co. v. Hurst, 36 Miss. 660, 669 (1859); *Belknap v. Boston & M.R. Co.*, 49 N.H. 358 (1870); *Meibus v. Dodge*, 38 Wis. 300, 311 (1875); *Cumberland Tel. & Tel. Co. v. Poston*, 30 S.W. 1040, 1041 (Tenn. 1895); *Aland v. Pyle*, 106 A. 349, 350 (Pa. 1919); 1 Sutherland, *supra*, at 745. TXO's *Amici* Owens-Illinois and Texaco claim that the admission of evidence regarding wealth has a "strange history" (*Amici* Br. 15 n.2) but the authority on which they rely, *Hilgedick v. Koehring Fin. Corp.*, 8 Cal. Rptr. 76, 101 (Ct. App.) (Peterson, J., concurring), *review granted*, 832 P.2d 899 (1992), refers only to the history of the practice *in California* and explains that an 1877 state decision relating to compensatory damages was extended almost a century ago to the context of punitive damages — creating a tradition extending from the Fourteenth Amendment's adoption to the present.

[40] *In re Paris Air Show*, 622 F.2d 1315 (9th Cir.) (Kennedy, J.) (upholding California's statutory restriction on punitive damages in wrongful death actions against equal protection challenge), *cert. denied*, 449 U.S. 976 (1980), cited by TXO for the proposition that wealth has prejudicial effects on a jury (Pet. Br. 36), in fact explains that not wealth but "[t]he *frequently violent and dramatic circumstances of accidents that lead to wrongful death actions*" might have those effects. *Id.* at 1323.

means under the same or similar circumstances." J.A. 35.[41]

Finally, TXO argues that the evidence admitted at trial was improper because it allegedly concerned the wealth of Texas Oil & Gas Corp. rather than of the supposedly separate TXO.[42] But, in the words of TXO vice president Michael Good, the two were "essentially the same operating entity." Tr. 648; *see also* Tr. 313 ("almost impossible . . . to establish any differentiation between the two entities"). Good, who headed the Charleston office of TXO, was also vice president of Texas Oil & Gas. Tr. 648. Duncan Wood testified that he "was employed by Texas Oil and Gas Corp."

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[41] TXO admits that the jury was given a host of factors besides wealth to consider, but insists that the jury was given "no numerical guide . . . as to any of these factors other than 'wealth.'" Pet. Br. 36 n.36. But the instructions gave the jury *no* "numerical guide" as to wealth and instead tied it closely to deterrence. If TXO's claim is that the jury likely attached too much weight to its wealth, because it is itself expressed as a number, then why would the jury not have attached equal weight to expected gain or to potential harm, which were also numbers, or to the out-of-pocket loss of $19,000? TXO's argument is utter conjecture.

TXO is flatly wrong in contending that the closing arguments suggested to the jury that it should base its punitive damages solely on TXO's wealth. To the contrary, counsel for Alliance stressed a deterrence rationale in their closing arguments. Pet. Br. App. 23a, 25a. Even when counsel mentioned TXO's wealth, they discussed it *only* in the context of deterrence. *E.g.*, *id.* at 22a ("When you think about fining this defendant, a corporation of this magnitude and this size, ladies and gentlemen, what would it take to keep them from doing this again?"). Moreover, the *closing arguments* could not have rendered suspect the *jury instructions*, which TXO conceded in the West Virginia Supreme Court were proper; TXO had an adequate state-law remedy for any allegedly prejudicial remarks in the closing; and TXO raised no objection to the closing arguments at trial, on appeal, or in its cert. petition.

[42] The jury was *not* instructed to consider the net worth of TXO's ultimate parent, USX Corp., nor was any such evidence introduced. An expert witness calculated the net worth of Texas Oil & Gas Corp. using annual reports and information from Value Line and Dow Jones News Service. Tr. 347, 351-52. He noted that TXO, not Texas Oil & Gas, sold one oil field a few weeks prior to trial for $159 million. Tr. 348. He explained four methods used by economists to value a company and used the most conservative method to value Texas Oil & Gas Corp. Tr. 350-54. His estimate did not include other companies within USX, such as Marathon Oil Co. Tr. 367-68. TXO offered no rebuttal evidence, even though it had "the best access" to such information. *Fenlon v. Brock*, 265 Cal. Rptr. 324, 328 (Cal. App. 4 Dist. 1989); *Morgan v. Woessner*, 975 F.2d 629, 641 (9th Cir. 1992).

and assigned to work for TXO. Tr. 560. On many important matters approval was required from Good's superior, a senior vice president of Texas Oil & Gas. Tr. 677. The April 2 assignment of lease from Alliance to TXO was "prepared by Texas Oil and Gas Corp." Tr. 474; Rec. 1628. The financial information of TXO and Texas Oil & Gas was consolidated. Tr. 651, Pet. App. 40a n.13, and TXO refused to disclose information relating to its finances. Pet. App. 40a-41a.[43] Thus, the evidence was properly admitted, and, in any event, the issue is not a federal constitutional one. *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1992). The state supreme court noted in the alternative that, in general, the net worth of parent companies is rationally related to the State's interests in deterrence and punishment and would therefore be admissible.[44]

b. The Fourteenth Amendment does not prohibit a State from permitting juries to consider the need for additional compensation in assessing punitive damages

After taking precisely the opposite position in the trial court, *see* n. 32, *supra*, TXO now objects, for the first time in this case, to the instruction that the jury could award punitive damages "to provide additional compensation for the conduct to which the injured parties have been subjected." J.A. 34. This instruction could hardly violate due process; the provision of needed additional compensation was one of the earliest justifications for punitive damages and

[43] Alliance requested TXO's financial records via two separate sets of interrogatories and motions to produce. *E.g.*, Interrogatory No. 6 (requesting that TXO produce "income tax returns, financial statements, and Forms 10-K for the years 1980 through 1985 inclusive") (R.754-56). TXO replied that financial records, separate and distinct from Texas Oil & Gas Corp., did not exist. Tr. 340(a), 340-43.

[44] Pet. App. 41a-42a; *see also* n.38. Washington Legal Foundation argues that the ruling was erroneous as a matter of West Virginia law, but cites no case involving the consideration of corporate wealth in punitive damages, ~~*see* Brief *Amicus Curiae*~~ at 7-18; the argument is at any rate irrelevant, *see Estelle v. McGuire*, 112 S. Ct. at 480; *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1874), and without force since its premise that judicial decisions arguably in tension are "void for vagueness" is simply wrong.

remains the practice in many States.[45] TXO's strained argument that the instruction could serve no state interest besides protectionism is belied by the fact that the rule governs all cases, regardless of the citizenship of the parties,[46] and by the explanation of the West Virginia courts that punitive damages provide additional compensation for the indeterminate damages caused by intentional egregious misconduct "[w]here the plaintiff's injury is incapable of precise measurement."[47] At any rate, TXO and Alliance Resources, the principal litigants in this case, are *both Texas* corporations.

B. The Post-Trial Review Satisfied Due Process

TXO mischaracterizes the issue of post-trial review in this case. In *Garnes*, the West Virginia Supreme Court (per Neely, J.), went *beyond Haslip* in affording procedural protections to defendants, *see* 413 S.E.2d at 908-10, and "set out a new system for the review of

[45] *See* C.T. McCormick, *Handbook Law of Damages* § 78, at 279 (1935); Brief *Amici Curiae* of Phillips Petroleum Co., et al., at 11; Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 Ala. L. Rev. 1079, 1085 (1989); *Continental Cas. Co. v. Fibreboard Corp.*, 762 F. Supp. 1368, 1376 (N.D. Cal. 1991); *Triangle Sheets Metal Works, Inc. v. Silver*, 222 A.2d 220, 225 (Conn. 1966); *Bourgeois v. State Farm Mut. Auto. Ins. Co.*, 562 So.2d 1177, 1179 (La. App. 4th Cir. 1990); *Creech v. Aetna Cas. & Sur. Co.*, 516 So.2d 1168, 1173 (La. App. 2d Cir. 1987), *writ denied*, 519 So.2d 128 (1988); *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980); *Transportation Ins. Co. v. Moriel*, 814 S.W.2d 144, 150 (Tex. Civ. App. — El Paso 1991); *Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984).

[46] Tellingly, TXO has raised no claim under the Privileges and Immunities Clause of Art. IV, § 2, or any other provision, charging that it suffered discrimination in the West Virginia courts. Indeed, the home States of TXO, Marathon Oil, and USX — Texas, Ohio, and Pennsylvania, respectively — are all *amici* supporting *respondents* in this case.

[47] *Wells v. Smith*, 297 S.E.2d 872, 879 (W. Va. 1982); *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227, 233 (W. Va. 1981); *cf. Harless v. First Nat'l Bank*, 289 S.E.2d 692, 702 (W. Va. 1982). TXO implies that the instruction afforded the jury too much discretion. But the charge limited punitive damages to the additional compensation *needed to remedy injuries caused by TXO*; it was at least as restrictive as an ordinary compensatory damages instruction. The jury was instructed not to speculate or guess with respect to compensation generally. J.A. 40.

punitive damages awards in West Virginia," *id.* at 908, including a series of factors for the trial judge to consider on post-trial review. *Id.* at 909. These factors surpass the Alabama post-trial review approved in *Haslip* (*see* Part II-B-1, *infra*), and will be applied in all future cases in West Virginia. In this case the trial judge — acting before *Haslip* and *Garnes* — did not have the benefit of this guidance. The West Virginia Supreme Court determined that, as a matter of state law, the trial had not complied with some of "the technical requirements set forth" in *Garnes*, applying those requirements retroactively "would unnecessarily send far too many cases back for retrial," Pet. App. 32a, and that such a course would be especially unwarranted here given TXO's procedural default. *See* p. 45, *infra*. Therefore, the state supreme court explained, it would rectify the matter by being "especially diligent in our review of punitive damages awards entered before *Garnes* was decided." Pet. App. 32a.

Whether this was a permissible way of dealing with a pre-*Haslip* trial was one of the questions on which TXO sought certiorari: "[w]hether TXO was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes*." But *this Court did not grant certiorari on that question*. TXO's attempt to transform its rejected question into an issue of the adequacy of post-trial review ignores the reasoning of the West Virginia Supreme Court.

Even on its own terms, however, TXO's argument has no merit.

1. The trial court's post-trial review complied with Haslip

TXO is wrong in asserting that the trial court in this case "summarily denied" its post-trial motion. Pet. Br. 41. To the contrary, the court held a hearing *on the record* in which it considered TXO's motion and revealed the basis for its decision: TXO had embarked on a deliberate corporate scheme of land fraud and deception, which its highest officials knew to be wrong.[48]

[48] The court explained that it had "read everything" that TXO had submitted in its 45-page brief and would entertain oral argument, particularly on new matters that had not been the subject of prior trial rulings. Pet. App. 56a-57a. The court permitted TXO's counsel to argue at length regarding the supposed infirmities in the punitive damages award, *id.* at 59a-69a, 72a-73a,

TXO did not ask for additional explanation, nor claim that its absence would offend due process. The issue thus was waived. Moreover, although the trial court did not issue a written opinion, *Haslip* does not require one. As revealed by this Court's reliance on *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), *see Haslip*, 111 S. Ct. at 1044 (citing *Hammond*), the purpose of post-trial review by the trial judge is to assist the state appellate court to "discharge fairly its role of review." 493 So.2d at 1379. The trial court's post-trial review performed that function in the case at bar; indeed, the West Virginia Supreme Court came to *precisely* the same conclusion as the trial court concerning the reasons that the verdict was not excessive. West Virginia trial courts effectively police excessive damages,[49] and the post-trial review in this case was fully as effective as in the Alabama scheme upheld in *Haslip*.[50]

Furthermore, the implications of TXO's argument are breathtaking. The Federal Rules of Civil Procedure do not require a court to specify the grounds for decision in ruling on motions for new trial or remittitur, and the settled practice in many States, like

and TXO's counsel further directed the court's attention to the "rather lengthy arguments in its brief." *Id.* at 65a. The trial court explained to the parties that it drew a strong inference of malice from the testimony of TXO vice president Michael Good. *See* pp. 11-12, *supra*. In the court's words, "What could be more egregious than the vice president of a company saying . . . that he knew all along that this property belonged to Tug Fork?" Pet. App. 66a. Good, the court continued, "was the head man, wasn't he?" *Id.* at 67a. TXO's counsel conceded, "That's correct. He was the head of the Charleston office." *Ibid.*

[49] *See, e.g., O'Neal v. Peake Operating Co.*, 404 S.E.2d 420, 422-23 (W. Va. 1991); *Tri-State Asphalt v. McDonough Co.*, 391 S.E.2d 907, 912-13 (W. Va. 1990); *Berry v. Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 367, 370 (W. Va. 1989); *Hardman Trucking, Inc. v. Poling Trucking Co.*, 346 S.E.2d 551, 552-53, 556-57 (W. Va. 1986); *Leach v. Biscayne Oil & Gas Co.*, 289 S.E.2d 197, 199 (W. Va. 1982); *Addair v. Huffman*, 195 S.E.2d 739, 741 (W. Va. 1973).

[50] The Alabama Supreme Court explained that there are no fixed standards that a trial court must apply and that, in the end, the test is the common-law excessiveness rule. *Hammond*, 493 So.2d at 1379. Under Alabama law there is a presumption that the jury's verdict was proper. *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222, 224 (Ala. 1989). TXO's own *amicus* demonstrates that the review is "extraordinarily deferential." Br. Alabama Bus. Council at 8.

West Virginia, is to the same effect.[51] TXO's implicit claim that the Federal Rules and settled state practice are unconstitutional in punitive damages cases is so far-fetched that not even TXO is willing to state it outright.

2. Any error was cured by the state supreme court's review

In *Haslip*, this Court implicitly indicated that two levels of judicial review were unnecessary, explaining that "*[t]he Alabama Supreme Court's post-verdict review*" — not post-trial review by trial courts — "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045; *cf. Clemons v. Mississippi*, 494 U.S. 738, 744-50 (1990). TXO's claim received careful appellate scrutiny — indeed, the West Virginia Supreme Court was "especially diligent in [its] review" in this pre-*Garnes* case, Pet. App. 32a — that rendered harmless any supposed infirmities at the trial level.[52]

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[51] *See* West Virginia R. Civ. P. 59; Fed. R. Civ. P. 59; 6A J. Moore, *Moore's Federal Practice* ¶59.11 (2d ed. 1991); *Fraidin v. Weitzman*, 611 A.2d 1046, 1067 (Md. App. 1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991); *see also Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 804 (Utah 1991) (reason for decision needed only where trial judge grants motion for new trial, in order to make clear that court is not invading the province of the jury); *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 931 (1978) (similar rule); *Las Palmas Assocs. v. Las Palmas Center Assocs.*, 235 Cal. App.3d 1220, 1258 n.8 (Cal. App. 2 Dist. 1991); *Wollersheim v. Church of Scientology*, 6 Cal. Rptr.2d 532, 540 (Cal. App. 2 Dist. 1992); Cal. Code Civ. Proc. § 657. Accordingly, post-trial hearings on the record have been held to satisfy *Haslip* without the need for a written opinion. *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991); *State Farm Mut. Auto Ins. Co. v. Zubiate*, 808 S.W.2d 590, 603 (Tex. Civ. App. — El Paso 1991); *General Motors Corp. v. Saenz*, 829 S.W.2d 230, 241 (Tex. Civ. App. — Corpus Christi 1991). Only where a trial court ruling is insufficient to permit meaningful appellate review of the award is a new trial necessary. *E.g., Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991). And there is no need to introduce constitutional heavy artillery. Where an appellate court cannot discern the basis for a trial court's decision, it has ample authority to remand the case to the district court. 9 C. Wright & A. Miller, *Federal Practice & Procedure* ¶ 2518 (2d ed. 1983).

[52] There is no due process right to appeal in state courts, even in criminal cases, *see Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *McKane v. Durston*, 153 U.S. 684, 687 (1894), because there is no constitutional right to more than one full and fair hearing. This case is the flipside of that rule. There is no justification for reading *Haslip* as holding that a state court is required to render its decision in a certain manner or that a State is required to provide more than one level of judicial review to a particular claim. "The general rule 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (citation omitted).

C. The Appellate Review Satisfied Due Process

The West Virginia Supreme Court granted discretionary review, even though TXO failed to comply with the preannounced requirements for such review. *Garnes*, 413 S.E.2d at 910.[53] Thus, although the court would have been justified in denying review completely, it overlooked TXO's procedural error and applied a "flexible approach" in reviewing the reasonableness of the award. Pet. App. 32a.

But this "flexible approach" — produced by TXO's procedural error rather than by a supine judicial posture — was hardly the sort of meaningless review described by TXO. Rather, the court synthesized the nine *Garnes* factors and the considerations mentioned in *Haslip*. The court observed that "[t]he *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards." Pet. App. 35a. The court "appl[ied] the *Garnes* 'reasonable relationship' test" and looked to: "(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future." *Id.* at 39a-40a.

Contrary to TXO's claim that "there is no limit on punitive damages" for intentional wrongdoing under this test (Pet. Br. 42

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[53] The court explained that TXO had argued merely that "all of the technical requirements set forth in syllabus points 3 and 4 of *Garnes* were not met," Pet. App. 32a; TXO had not, as it was required to do, addressed with particularity each factor of the nine syllabus points by which excessiveness was to be determined and summarized the evidence presented to the jury and trial court on these points. Instead, TXO claimed simply that "the procedural requirements established in [*Garnes*] were not followed," TXO State Ct. Br. 8, and that summarizing evidence was unnecessary. TXO State Ct. Reply Br. 33. The court has denied review in similar cases. *See Davis v. Celotex Corp.*, 420 S.E.2d 557, 567 (W. Va. 1992); *Pote v. Jarrell*, 412 S.E.2d 770, 777 (W. Va. 1991).

n.42), the court's review ensured that the award would be limited to that "required to cause the defendant to mend its evil ways and to discourage others similarly situated from engaging in like reprehensible conduct." Pet. App. 39a.[54] The West Virginia Supreme Court has proved itself more than willing to reduce or eliminate excessive damages,[55] and the adoption of the stringent approach outlined in *Garnes* ensures that court will remain a leader among state courts in policing punitive damages awards.[56]

TXO's suggestion that it was subjected to a rough-and-ready "really stupid/really mean" analysis is preposterous. That discussion, however colorful,[57] was plainly dictum, as evidenced by the fact that it does not appear in the court-drafted syllabus,

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[54] Contrary to TXO's claim that "the West Virginia Supreme Court conducted no comparative analysis," Pet. Br. 41, in fact the court "examined all of the punitive damages opinions issued since *Haslip* was decided in an attempt to find some pattern in what courts find reasonable," Pet. App. 35a.

[55] *See Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991) (Neely, J.); *Arnoldt v. Ashland Oil, Inc.*, 412 S.E.2d 795, 806-07 (W. Va. 1991); *Shamblin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 766, 773 (W. Va. 1990); *Bennett v. 3 C Coal Co.*, 379 S.E.2d 388, 394 (W. Va. 1989); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 80-81 (W. Va. 1986) (Neely, J.); *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 800 (W. Va. 1986) (Neely, J.); *Harless v. First Nat'l Bank*, 289 S.E.2d 692, 699, 702-06 (W. Va. 1982).

[56] The court recognized that "some courts have been less willing than this Court in *Garnes* to take seriously the U.S. Supreme Court's guidance," Pet. App. 28a, and the caselaw indeed reveals that the West Virginia court's review is unsurpassed in its extensiveness. Indeed, the review in many States is far less rigorous. *See, e.g., Wollersheim v. Church of Scientology*, 6 Cal. Rptr.2d 532, 537 n.4 (Cal. App. 2 Dist. 1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1099 (5th Cir. 1991); *Coyne v. Allstate Ins. Co.*, 771 F. Supp. 673, 680 (E.D. Pa. 1991); *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874-75 (Mo. App. 1991); *Oberg v. Honda Motor Corp.*, 814 P.2d 517, 524 (Ore. 1991).

[57] In truth, those labels were shorthand for well-understood distinctions in degrees of intentionality. Pet. App. 36a, 38a. Justice Neely has explained that the sometimes colloquial references in his writings "should be taken neither as evidence of cynicism nor as evidence of cavalier disregard" for the matter at hand. R. Neely, *How Courts Govern America* xii (1981). "Fifteen years ago as an instructor of undergraduates I learned that it is usually the funny, absurd, or ironic example which sustains the interest of people studying complicated and technical material." *Ibid.*

which under state law describes all "points adjudicated" by the court, West Virginia Const. Art. VIII, § 4, and by the fact that Chief Justice McHugh and Justice Miller joined in a *concurring* opinion (not in an opinion *concurring in the judgment*) in which they objected to the use of the unnecessary "really stupid/really mean" terminology. Pet. App. 53a. More fundamentally, the dichotomy was meant to *aid defendants* who, unlike TXO, have not been proved guilty of intentional, deliberate, and malicious wrongdoing. The West Virginia court's only point — which one would have thought the tort reform movement would embrace rather than assail — was that, in cases of "extreme carelessness," Pet. App. 36a, where compensatory damages "are neither negligible nor very large," *id.* at 38a, "the outer limit of punitive damages is *roughly* five to one." *Ibid.* Although this suggestion is more refined than some of the mathematical ratio rules advocated by TXO's *amici*, *see* Br. of Alabama Business Council at 18, it is of the same ilk. The proposed 5:1 limit is a substantive ceiling *in addition* to the procedural protection already afforded by *Garnes*. Whatever its merits, *see* Part I, *supra*, the proposed 5:1 limit is irrelevant in this case, where TXO "intentionally committed mean-spirited and harmful acts." Pet. App. 39a. TXO does not and cannot challenge this fact-based holding and thus in any event was not entitled to the benefit of Justice Neely's novel 5:1 proposal.

D. The Procedure Applied Was Not Void for Vagueness

TXO did not raise a "void-for-vagueness" argument before the West Virginia Supreme Court, and that court did not pass on it. The claim has no basis in the record of the case and is squarely foreclosed by this Court's holding in *Haslip*, 111 S. Ct. at 1046 n.12, which rejected the identical void-for-vagueness argument premised on *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). Lower courts have rejected the argument as well,[58] and TXO provides no

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[58] *See, e.g., Las Palmas Assocs. v. Las Palmas Center Assocs.*, 235 Cal. App.3d 1220, 1259 (Cal. App. 2 Dist. 1991); *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F. Supp. 1520, 1533 (W.D. Mo. 1992); *W.W. Mgt. & Dev. Co. v. Scottsdale Ins. Co.*, 769 F. Supp. 178, 179-81 (E.D. Pa. 1991); *Galjour v. General Am. Tank Car Corp.*, 764 F. Supp. 1093, 1099-100 (E.D. La. 1991); *Coyne v. Allstate Ins. Co.*, 771 F. Supp. 673, 676-77 (E.D. Pa.

reason to revisit, much less revise, this settled law.

First, standardless jury discretion, which rather than lack of notice was the theory of Justice O'Connor's void-for-vagueness argument in *Haslip*, *see* 111 S. Ct. at 1057-61, is not of concern here. The jury charge gave more guidance than that in *Haslip* and omitted the provision that damages were "entirely discretionary"; the trial court's post-trial review was as extensive as Alabama's; and the appellate review was unsurpassed in its rigor, despite TXO's procedural default. TXO's argument is premised on gross distortions of the proceedings below. In any event, TXO identifies no constitutional standard to measure the proper quantum of jury discretion in assessing punitive damages. *See* pp. 32-33, *supra*.

Second, a vagueness argument premised on lack of notice is also unavailing. When TXO hatched its scheme in 1985, it had notice that it faced punitive liability sufficient to punish and deter its wrongdoing, commensurate with the vast profits and large potential for social harm its scheme entailed.[59] *Wells v. Smith*, 297 S.E.2d 872, 878 (W. Va. 1982); *Leach v. Biscayne Oil & Gas Co.*, 289 S.E.2d 197 (W. Va. 1982). In *Wells*, the court held that punitive damages could be assessed even if a plaintiff suffered *no* actual damages, creating the possibility of truly astronomical (and indeed infinite) ratios between the two. *See* 297 S.E.2d at 880. This aspect of *Wells* was overruled in *Garnes*, 413 S.E.2d at 908 — *after*

1991); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 480 (9th Cir. 1977); *Gourley v. State Farm Mut. Auto. Ins. Co.*, 227 Cal. App.3d 1099, 1111 (Cal. App. 3 Dist. 1990); *Egan v. Mutual of Omaha Ins. Co.*, 133 Cal. Rptr. 899, 914 (Cal. App. 2 Dist. 1976); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 214 (Colo. 1984).

[59] TXO pretends that it was hit by a $10 million judgment like a bolt from the blue, when the fact is that TXO deliberately embarked on an intentional attempt to steal as much as $8.3 million in royalties, using means that have been unlawful since at least the year 1591. Pet. App. 14a. By its *own calculations* TXO faced a punitive award of anywhere from 2 to 10 times its expected gain. Pet. Br. 30 n.31. The relevant question certainly isn't whether a person could expect that "a proper punishment for slander of title could reach the level of $10 million for a single infraction," Pet. Br. 46 n.47; all acts of slander of title are not the same. The tort system awards damages based on the facts and circumstances of each case, not according to some advertised price list for intentional wrongdoing.

TXO's wrongdoing occurred.[60]

Moreover, notice of punitive damage liability is not constitutionally required. In *Haslip*, this Court rejected a void-for-vagueness attack identical to TXO's, explaining that "[d]ecisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." 111 S. Ct. at 1046 n.12. TXO attempts to distinguish this holding by pointing to alleged factual differences between the cases. Pet. Br. 46 n.47. These differences are contrived, but are in any event irrelevant because the force of the analysis in *Haslip* is squarely apposite here: so long as rules of primary conduct are clear, liability for their violation need not be spelled out with great precision in advance.[61] *Cf. Smith v. Wade*, 461 U.S. at 50. Any

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[60] TXO did not seek, and this Court did not grant, certiorari on the question of whether TXO had adequate notice of the West Virginia Supreme Court's formulation of the slander-of-title tort. Nonetheless, TXO attempts to argue that it should not be held liable for a common-law tort that had not theretofore been recognized in West Virginia, even though the tort has existed in common-law jurisdictions since at least 1591 (Pet. App. 14a). Indeed, slander of title is the subject of caselaw in every State but South Carolina, and the doctrine is included in the Restatement (Second) of Torts §§ 623A, 624 (1977). *See also* W.P. Keeton, *Prosser & Keeton on Torts* §128 (5th ed. 1984); Annot., *Allowance for Punitive Damages in Actions for Slander of Title*, 7 A.L.R.4th 1219. TXO also contends that the trial court and West Virginia Supreme Court erred in interpreting the state-law elements of slander of title. Pet. Br. 48. TXO's state-law objections are irrelevant, *see* n. 44, *supra*, and in any event wrong. The "actual malice" instruction given, J.A. 24, is fully consistent with the majority rule, *e.g.*, Restatement (Second) of Torts §623A(b) & comment (d). The trial court and state supreme court also followed "the clear majority rule in holding that attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title." Pet. App. 20a (citing cases).

[61] Although advance notice of a penalty would no doubt permit an individual to calculate on a cost-benefit basis whether to comply with the law, such an interest is not protected by the Due Process Clause. *Cf. United States v. Dunnigan*, No. 91-1300 (Feb. 23, 1993). Indeed, deterrence is achieved in part by maintaining an element of unpredictability. *See Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 809 (Utah 1991); Toy, Note, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L.J. 303, 324-25 (1991). The dictum in Justice Marshall's opinion in *United States v. Batchelder*, 442 U.S. 114, 123 (1979), is not to the contrary. This Court has never found the criminal penalty provisions of any statute too vague to

other rule would cast many criminal sentencing procedures — where concerns about vagueness are much more salient than they are here, *see Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) — into constitutional doubt.[62]

CONCLUSION

In the end, TXO and its *amici* focus less on the decision below than on what they advertise as a punitive damages "crisis," and what other *amici* contend is largely a mirage created by a concerted and well-financed public relations campaign. Whatever the outcome of that debate, this Court reviews judgments in cases and controversies, not complex matters of public policy. This case is the admittedly unusual instance where considerations of deterrence and punishment easily justify a 526:1 ratio of punitive damages to out-of-pocket loss. If TXO's *amici* are to be believed, there are many other, more suitable cases in which the need for restrictions on punitive damages could be far better evaluated.

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satisfy due process. Moreover, the authorities on which the *Batchelder* dictum rests are two statutory interpretation cases, *see United States v. Evans*, 333 U.S. 483 (1948); *United States v. Brown*, 333 U.S. 18 (1948), and *Giaccio*, which this Court in *Haslip* noted was inapposite because it involved lack of standards in determining what *conduct* was prohibited.

[62] The effective range for first-degree felonies in Utah, for example, is effectively zero to life. *See* Riggs, *supra*, at 912 n.189; *see also Stevens v. Armatrout*, 787 F.2d 1282 (8th Cir. 1986) (upholding constitutionality of sentence of 200 years under statute providing for sentence of "any term of years").

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APPENDIX TO BRIEF OF RESPONDENTS

This Appendix is a survey of the caselaw in 37 States in which the finder of fact either is *permitted* to consider evidence regarding a defendant's wealth in assessing punitive damages or is *required* to do so. Decisions holding the former are indicated with a parenthetical "may"; decisions holding the latter are indicated with a "must."

Alaska

Clary Ins. Agency v. Doyle, 620 P.2d 194, 205 (Alaska 1980) (may); *Ben Lomond, Inc. v. Campbell*, 691 P.2d 1042, 1048 (Alaska 1984) (may).

Arizona

Hawkins v. Allstate Ins. Co., 733 P.2d 1073 (Ariz.), *cert. denied*, 484 U.S. 874, *and reh'g denied*, 484 U.S. 972 (1987) (may); *Puz v. McDonald*, 680 P.2d 213, 215 (Ariz. Ct. App. 1984) (may).

Arkansas

Viking Ins. Co. v. Jester, 836 S.W.2d 371, 379 (Ark. 1992) (may); *Porter v. Lincoln*, 668 S.W.2d 11, 14 (Ark. 1984) (may).

California

Neal v. Farmers Ins. Exchange, 582 P.2d 980, 990 (Cal. 1978) (may); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204, 210 (Cal. Ct. App. 1984) (may).

Delaware

Strauss v. Biggs, 525 A.2d 992, 1000 (Del. 1987) (may); *Jardel Co. v. Hughes*, 523 A.2d 518, 527 (Del. 1987) (may).

District of Columbia

Levine v. Mills, 114 A.2d 546, 549 (D.C.), *aff'd in part*, 233 F.2d 16 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 858 (1956)(applying law of District of Columbia) (may); *Curry v. Giant Food Co.*, 522 A.2d 1283, 1290 (D.C. Cir. 1987)(applying law of District of Columbia) (may).

Florida

Bould v. Touchette, 349 So.2d 1181, 1187 (Fla. 1977) (may); *Atlas Properties, Inc. v. Didich*, 226 So.2d 684, 689 (Fla. 1969) (may).

Hawaii

Man v. Raymark Industries, 728 F. Supp. 1461, 1467 (D.Haw. 1989)(applying Hawaii law) (may); *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1352 (D.Haw. 1975)(applying both federal and Hawaii law) (may).

Idaho

Dwyer v. Libert, 167 P. 651, 653-54 (Idaho 1917) (may); *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 772 (9th Cir. 1984) (applying Idaho law as to damages) (may).

Illinois

Black v. Iovino, 580 N.E.2d 139, 149-50 (Ill. Ct. App. 1991), *app. denied*, 587 N.E.2d 1011 (Ill. 1992) (must); *Central Bank-Granite City v. Ziaee*, 544 N.E.2d 1121, 1126-27 (Ill. Ct. App. 1989), *app. denied*, 548 N.E.2d 1067 (Ill.) (may).

Indiana

Dow Chemical Co. v. St. Vincent Hosp. & Health Care Center, Inc., 553 N.E.2d 144, 157 (Ind. Ct. App. 1990) (may); *Archem, Inc. v. Simo*, 549 N.E.2d 1054, 1058 (Ind. Ct. App. 1990), *cert. dismissed*, 111 S. Ct. 944 (1991) (may).

Iowa

Poulsen v. Russel, 300 N.W.2d 289, 295 (Iowa 1981) (may); *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421, 424 (Iowa 1977) (may).

Kansas

Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1238-39 (Kan. 1987) (may); *Henderson v. Hassur*, 594 P.2d 650, 665 (Kan. 1979) (may).

Maine

Caron v. Caron, 577 A.2d 1178, 1180-81 (Me. 1990) (must); *Saunders v. Van Pelt*, 497 A.2d 1121, 1127 (Me. 1985) (must).

Maryland

Heinze v. Murphy, 24 A.2d 917, 921 (Md. 1942) (may); *Thorne v. Contee*, 565 A.2d 102, 111 (Md. Ct. App. 1989), *cert. denied*, 569 A.2d 643 (Md. 1990), *and cert. denied*, 569 A.2d 1242 (Md.) (may).

Minnesota

Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 740 (Minn.), *cert. denied, sub nom Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980) (may); *GN Danavox v. Starkey Labs.*, 476 N.W.2d 172, 177 (Minn. Ct. App. 1991) (may).

Mississippi

Employers Mut. Cas. Co. v. Tompkins, 490 So.2d 897, 907-08 (Miss. 1986) (must); *C&C Trucking Co. v. Smith*, No. 90-CA-0366, 1991 WL 389051, *8-11 (Miss. 1991) (may).

Missouri

Seested v. Post Printing & Pub. Co., 31 S.W.2d 1045, 1054 (Mo. 1930) (may); *Lipari v. Volume Shoe Corp.*, 664 S.W.2d 953, 959, 959 n.2 (Mo. Ct. App. 1983) (may).

Montana

Zugg v. Ramage, 779 P.2d 913, 917 (Mont. 1989) (may); *Gibson v. Western Fire Ins. Co.*, 682 P.2d 725, 740 (Mont. 1984) (may).

Nevada

Ainsworth v. Combined Ins. Co., 763 P.2d 673, 677 (Nev. 1988), *cert. denied*, 493 U.S. 958 (1989) (may); *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 746 P.2d 132, 137-38 (Nev. 1987) (may).

New Jersey

Herman v. Sunshine Chemical Specialties, Inc., 608 A.2d 978, 983 (N.J. Super. Ct. App. Div.), *cert. granted*, 614 A.2d 620 (N.J. 1992) (may); *Leimgruber v. Claridge Associates, Inc.*, 375 A.2d 652, 655 (N.J. 1977) (may).

New Mexico

DeMatteo v. Simon, 812 P.2d 361, 364 (N.M. Ct. App. 1991) (may); *Gonzales v. Sansoy*, 703 P.2d 904, 908 (N.M. Ct. App. 1984) (may).

North Carolina

Willeford v. Bailey, 43 S.E. 928, 929-30 (N.C. 1903) (must).

North Dakota

Olmstead v. First Interstate Bank, N.A., 449 N.W.2d 804, 810 (N.D. 1989) (may); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 754 (N.D. 1989) (may).

Ohio

Wagner v. McDaniels, 459 N.E.2d 561, 564 (Ohio 1984) (may); *Hayner v. Cowden*, 27 Ohio St. 292, 296-97 (1875) (may).

Oklahoma

Mitchell v. Ford Motor Credit Co., 688 P.2d 42, 46 (Okla. 1984) (may); *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1460 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986)(applying Oklahoma law) (may).

Rhode Island

Hargraves v. Ballou, 131 A. 643, 646 (R.I. 1926) (may); *Emery Waterhouse Co. v. Rhode Island Hospital Trust Nat. Bank*, 757 F.2d 399, 410-11 (1st Cir. 1985)(applying Rhode Island law) (may).

South Carolina

Gamble v. Stevenson, 406 S.E.2d 350, 354 n.3 (S.C. 1991); *Patterson v. Bogan*, 198 S.E.2d 586, 590 (S.C. 1973) (may).

South Dakota

Hulstein v. Meilman Food Industries, Inc., 293 N.W.2d 889, 892 (S.D. 1980) (may); *Davis v. Merill Lynch, Pierce, Fennder & Smith, Inc.*, 906 F.2d 1206, 1225 (8th Cir. 1990) (applying South Dakota law) (may).

Tennessee

Andersen v. Latham Trucking Co., 728 S.W.2d 752, 754 (Tenn. 1987) (may); *Coppinger Color Lab, Inc. v. Nixon*, 698 S.W.2d 72, 74 (Tenn. 1985) (may).

Texas

Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988) (may); *State Farm Mut. Life Ins. Co. v. Zubiate*, 808 S.W.2d 590, 602 (Tex. Civ. App. 1991) (may).

Utah

Cruz v. Montoya, 660 P.2d 723, 727 (Utah 1983) (must); *Nelson v. Jacobsen*, 669 P.2d 1207, 1219 (Utah 1983) (must).

Vermont

Lent v. Huntoon, 470 A.2d 1162, 1172 (Vt. 1983) (may); *Parker v. Hoefer*, 100 A.2d 434, 446-47 (Vt. 1953) (may).

Virginia

Weatherford v. Birchett, 164 S.E. 535, 537 (Va. 1932) (may); *Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387, 1394-95 (4th Cir.), *cert. denied*, 405 U.S. 1017 (1971)(appying Virginia law) (may).

West Virginia

Riddle v. McGinnis, 22 W. Va. 253, 278 (1883) (may); *Goodwin v. Thomas*, 403 S.E.2d 13, 16 (W. Va. 1991) (should consider).

Wisconsin

Wangen v. Ford Motor Co., 294 N.W.2d 437, 460 (Wis. 1980) (may); *Dalton v. Meiser*, 188 N.W.2d 494, 498 (Wis. 1971), *cert. denied*, 405 U.S. 934 (1972) (may).

Wyoming

United States ex. rel. Farmers Home Admin. v. Redland, 695 P.2d 1031, 1040 (Wyo. 1985) (may); *Adel v. Parkhurst*, 681 P.2d 886, 891 (Wyo. 1984).